Feb. 16. Rec'd Writ of Error & Transcript & Citation & service admitted

Feb 17 Portions of the record filed

Feb. 24. Mo. Docket

Feb 16 - Aff. Filed

SUPREME COURT OF THE UNITED STATES.

No. ~~824.~~ 240/124

JAMES B. TOWNSEND AND JOHN P. POWELSON, PLAINTIFFS IN ERROR,

vs.

GEORGE G. GREELEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

See pages 61. 62. 69

25 Cal 614

Statutes of 1863-4 p 333. Sec. 5.

SUPREME COURT OF THE UNITED STATES.

No. 324.

JAMES B. TOWNSEND AND JOHN P. POWELSON, PLAINTIFFS IN ERROR,

vs.

GEORGE G. GREELEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	A 1	1
Citation	" 2	1
Bond	" 3	2
Assignment of errors	" 4	3
Complaint	1	4
Summons	4	5
Separate answer of Jas. B. Townsend	6	6
Jno. P. Powelson	12	7
Replication to sep. ans. of Jas. B. Townsend	21	11
Demurrer of Jno. P. Powelson to pl'ff's 3d replication	26	12
Jas. B. Townsend do. do	28	13
Replication to sep. ans. of Jno. P. Powelson	30	13
Order submitting demurrer to 3d replication	35	13
sustaining do. do	36	15
Judgment	37	15
Certificate of clerk to judgment roll	40	16
Notice of intention to move for a new trial	41	17
Engrossed statement for new trial	42	17
Ernest Hayn examined on behalf of plaintiff	44	18
Henry Garthwaite do. do	48	19
H. D. Carlton do. do	51	20
Wm. Barry do. do	54	21
Moses Whitcombe do. do	56	22
Charles Geddes do. do	58	23
Geo. G. Greely do. do	62	24
James B. Townsend do. do	64	25

	Original.	Print.
Chas. Van Antwerp examined on behalf of plaintiff	75	29
Geo. Y. Loring do. do	76	29
Chas. A. Spaulding do. do	82	31
Festus O'Donnell do. do	86	32
Jos. T. Simmons do. do	86	33
Henry E. Carlton do. do	87	33
Deed, S. B. Conrey to F. H. Woods	104	38
F. H. Woods to S. B. Conrey	106	39
S. B. Conrey to Hepsebeth Carlton	109	40
Henry E. Carlton to George G. Greely	112	42
Henry E. Carlton examined on behalf of pl'ff	115	43
Andrew Williams exam'd on behalf of def'ts	118	44
Deed, Chas. Vogel to James W. Parker	120	44
Power of att'y, Jas. W. Parker to Andrew Williams	125	46
Deed, Jas. W. Parker (by his att'y A. Williams) to Jas. E. Munford	129	47
John Laws exam'd on behalf of def'ts	137	50
John W. Morton do	139	51
Wm. H. Hyde do	140	51
Jno. W. Murray do	142	52
Anthony Boyer do	143	53
D. B. Hughes do	145	53
Harrison P. Eayres do	147	54
Louis Lachman do	152	56
Cert. copy petition city and county of San Francisco to board U. S. land comm'rs	156	57
Cert. copy decree board U. S land commissioners	164	60
Power of att'y, James E. Munford to Jas. B. Townsend	173	63
Lease, James E. Munford (by attorney Jas. B. Townsend) to Jno. P. Powelson.	176	64
D. B. Hughes recalled on behalf of defendants	181	65
Leonard Hodgkins examined do	185	67
Henry E. Carlton recalled on behalf of pl'ff	189	68
Court's charge to jury	190	69
Order submitting motion for new trial	214	77
denying do. do	115	77
Notice of appeal	116	77
Certificate	237	84

1 The President of the United States of America to the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, on the sixth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in a plea lately pending before you between George G. Greeley, plaintiff and respondent, and James B. Townsend and John P. Powelson, defendants and appellants, and wherein said judgment was rendered against said James B. Townsend and John P. Powelson, defendants and appellants, manifest error hath happened, to the great damage of said last-named defendants and appellants therein, as by their complaint appears; and it being fit that the error, if any there have been, should

2 be duly corrected, and full and speedy justice done to the parties last aforesaid in this behalf, you are hereby commanded that if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Hon. Roger B. Taney, chief justice of the said Supreme Court, this 18th day of April, A. D. 1864, and of the independence of the United States the eighty-eighth.

In testimony whereof, the clerk of the circuit court of the United

3 States for the northern district of California hath hereunto subscribed his name and affixed the seal of said circuit court, at the city of San Francisco, this 10th day of June, A. D. one thousand eight hundred and sixty-four.

[SEAL.]

HENRY C. HYDE,
Clerk U. S. circuit court, North. Dist. Cal'a.

4 To the honorable justices of the Supreme Court of the United States:

The return to the within writ of error appears by the transcript of the record and proceedings in the within-mentioned cause of George G. Greeley *vs.* James B. Townsend and John P. Powelson hereto annexed.

Witness my hand and the seal of the supreme court of the State of California hereto affixed this twenty-fifth day of July, A. D. 1864.

[SEAL.]

W. D. HARRIMAN,
Clerk of the Supreme Court of California,
By WM. G. WOOD, *D'y Cl'k.*

(U. S. rev. stamp, 5 cts.)

Filed June 14, 1864.

HARRIMAN, *Cl'k,*
By WOOD, *D. C.*

5 United States of America to George G. Greeley, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to writ of error filed in the clerk's office of supreme court of the State of California, wherein James B. Townsend and John P. Powelson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned

should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable James M. Wayne, justice of the Supreme Court of the United States, this tenth day of October, A. D. 1864.

JAMES M. WAYNE,
Associate Justice, Sup. Court U. S.

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

Hermann G. Miller, of lawful age, being duly sworn, on his oath,
6 states that he served the foregoing citation on the therein-mentioned George G. Greeley by delivering to and leaving with James F. Hubbard, esq., one of the firm of Burbank & Hubbard, attorneys of record for the said Greeley in the action mentioned in said citation, a true copy of said citation, and showing him (said Hubbard) said original citation, (which he read,) within said city and county of San Francisco, on the 9th day of November, A. D. 1864; and by delivering to and leaving with Wm. W. Crane, jr., esq., attorney for said Greeley in said action, a like true copy of said citation, and showing him, the said Crane, said original, within said city and county, on the 11th day of November, A. D. 1864, and that this affiant has no interest whatever in the result of said action.

HERMANN G. MILLER.

Sworn to and subscribed on this twelfth day of November, A. D. 1864, before me.

F. J. THIBAULT, *Notary Public.*

(U. S. rev. stamp, 5 cts.)

7 In the supreme court of the State of California.

GEORGE G. GREELEY
vs.
JAMES B. TOWNSEND and JOHN P. POWELSON.

Know all men by these presents that we, William H. Sharp, of the city and county of San Francisco, freeholder, and David D. Colton, of the same place, freeholder, are held and firmly bound unto the above-named George G. Greeley in the just and full sum of eight hundred dollars, lawful money of the United States, to be paid to the said George G. Greeley, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our respective heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this thirteenth day of June, A. D. 1864.

The condition of this obligation is such, that whereas the above named James B. Townsend and John P. Powelson have sued out a writ of error from the Supreme Court of the United States, to reverse the judgment rendered by said supreme court of the State of California in the above-entitled
8 action in favor of the said George G. Greeley: Now, if the said James B. Townsend and John P. Powelson shall prosecute said writ of error to effect, and shall answer all damages and costs which shall be adjudged against them if they fail to make good their said plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

WM. H. SHARP. [SEAL.]
DAVID D. COLTON. [SEAL.]

Executed and delivered in presence of—
HENRY HAIGHT.

STATE OF CALIFORNIA, *City and county of San Francisco, ss:*

William H. Sharp and David D. Colton, each for himself deposes and says that he is a resident of said city, county, and State, and a freeholder therein, and that he is worth the sum of eight hundred dollars over and above all his just debts and liabilities, and exclusive of property which by law is exempt from levy and sale on execution.

WM. H. SHARP.
DAVID D. COLTON.

Sworn to and subscribed this 13th day of June, A. D. 1864, before me.
HENRY HAIGHT, *Notary Public.*

[SEAL.]

(U. S. Rev. stamp, 5 cts.)

9 I hereby approve the foregoing bond and security.
Oct. 10, 1864.

JAMES M WAYNE,
Associate Justice Sup. Court U. S.

10 In the Supreme Court of the United States.

JAMES B. TOWNSEND and JOHN P. POWELSON, plaintiffs in error,
vs.
GEORGE G. GREELEY, defendant in error.

And now come the said plaintiffs in error and say, and each for himself says, that in the record and proceedings of said supreme court of the State of California in said action, and in the giving of judgment therein, there is manifest error in this, to wit:

That the said supreme court of the State of California affirmed the judgment of the 12th district court of California, rendered in said action, whereas, by the law of the land, the judgment of said 12th district court therein should have been reversed, for the refusal of said 12th district court to admit in evidence, on the trial of said action therein, the certified copy of the petition of the city of San Francisco, presented to and filed before the board of commissioners appointed and sitting under the act of Congress passed March 3d, A. D. 1851, entitled "An act to ascertain and settle the private land claims in the State of California," the certified copy of the decree of
11 said board of commissioners rendered upon said petition, and the other evidence in connexion therewith, all offered by said plaintiffs in error, (defendants in that court,) to prove a final confirmation by the United States of America to said city of San Francisco of the lot of land sued for in this action, and to prove a deraignment of title thereto, under said confirmation, from said city to one James E. Munford, under whose title said plaintiffs in error (defendants in that court) undertook and claimed the right to justify the taking possession and holding of said lot of land.

And said plaintiffs in error pray that the judgment aforesaid, for the error aforesaid, and other errors in the said record and proceedings appearing, be reversed, annulled, and for naught held, and that they be restored to all things which they have lost thereby, and that such judgment be rendered herein as the said supreme court of California ought to have rendered, and that the same be executed.

JOHN VAN ARMAN,
Of counsel for Plaintiffs in Error.

12 *Complaint.*

In the district court of the twelfth judicial district, in and for the city and county of San Francisco.

GEORGE G. GREELY, pl'ff,
vs.
JAMES B. TOWNSEND, CHARLES GEDDIS, and POWELSON, deft's.

George G. Greely, of the city and county of San Francisco, plaintiff in the above-entitled action, complains against James B. Townsend, Charles Geddis, and Powelson, all of the city and county of San Francisco, and State of California, defendants in said action, and for cause of complaint says and alleges that he is the lawful owner in fee simple of a certain lot of land situate, lying, and being in the city and county of San Francisco; said lot of ground being a portion of fifty-vara lot, numbered on the official map of said city eleven hundred and eighty-eight, (1188,) and bounded as follows: Commencing on the southerly line of Clay street, at a point sixty-eight feet and nine inches westerly from the southwest corner of Clay and Leavenworth streets; thence running westerly on said southerly line of Clay street sixty-eight feet and nine inches, (68 ft. 9 in.;) thence southerly and
13 parallel with Leavenworth street, one hundred thirty-seven feet and six inches, (137 ft. 6 in.;) thence easterly and parallel with Clay street, sixty-eight feet and nine inches (68 ft. 9 in.;) thence northerly and parallel with Leavenworth street, one hundred and thirty-seven feet and six inches, (137 ft. 6 in.,) to the place of beginning. And the plaintiff further says that he, on the second day of April, 1862, and for a long time before that, was, and still is, the lawful owner in fee simple of said described lot of ground. And the plaintiff further alleges that on the second day of April, 1862, he was in the lawful, peaceable, and quiet possession of said described lot of land, and had been in such possession for the full space and term of seven years next before said second day of April, 1862, and being in such ownership and possession of said lot, the said defendants on said second day of April, with force and arms, and without lawful right or authority, did unlawfully and unjustly enter into and upon said premises, and unlawfully take possession of the same, and oust and expel the plaintiff therefrom, and still unlawfully withhold the said premises from this plaintiff, to the damage of the plaintiff, as he says, in the sum of five hundred dollars. And the plaintiff further alleges that the reasonable use of said premises is twenty dollars per month. And the plaintiff claims, as rents and profits of said defendants of said premises, twenty dollars per month while the possession shall be held from him.

14 Wherefore, this plaintiff prays this hon. court for a judgment against the said defendants for the restitution of said premises for damages and costs, rents and profits, and for such other and further relief as this court may have power to grant.

BURBANK & HUBBARD, *Att'ys for Pl'ff.*

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

George G. Greely, having been duly sworn, on oath, says that he is the plaintiff in the above-entitled action; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated therein upon his information or belief, and as to those he believes it to be true.

GEO. G. GREELY.

Subscribed and sworn to before me this 5th day of April, A. D. 1862.
F. J. THIBAULT, *Notary Public.*
[SEAL.]

Endorsed: Filed April 8th, 1862.
W. BARTLETT, *Cl'k,*
Per W. R. SATTERLEE, *D. C.*

15 *Summons.*

In the district court of the 12th judicial district of the State of California, in, and for the city and county of San Francisco.

GEORGE G. GREELY, plaintiff,
vs.
JAMES B. TOWNSEND *et al.*, defendants.

The people of the State of California send greeting to James B. Townsend, Charles Geddis, ——— Powelson, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served without this county, or if served within this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain judgment for the restitution of certain premises particularly described in the complaint, for $500 damages for the unlawful detention of said premises, and $20 per month as rents and
16 profits thereof, also for general relief and costs; and you are thereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and seal of the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, this 8th day of April, in the year of our Lord one thousand eight hundred and sixty-two.
[SEAL.]
WASHINGTON BARTLETT, *Clerk,*
By WM. SATTERLEE, *D. C.*

Endorsed:

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 8th day of April, A. D. 1862, and personally served the same on the 8th day of April, 1862, upon James B. Townsend, and on April 15th, 1862, upon J. P. Powelson, (as Powelson) and on April 29th, 1862, upon Charles Geddis, the thereinnamed defendants personally, in the city and county of San Francisco, a copy of said summons, the summons delivered to J. B. Townsend, being attached to a certified copy of the complaint in said action therein
17 named, dated San Francisco this 29th day of April, 1862.
JOHN S. ELLIS, *Sheriff,*
By H. D. LAMUNT, *D. S.*

Endorsed: Filed this 29th day of April, A. D. 1862.
WASHINGTON BARTLETT, *Clerk,*
By WM. R. SATTERLEE, *D. C.*

Separate answer of James B. Townsend.

In the district court of the 12th judicial district of California, in and for the city and county of San Francisco.

GEORGE G. GREELY, pl'ff,
vs.
JAMES B. TOWNSEND, impleaded with others, def'ts

And now comes the said James B. Townsend, and for himself separately answers the complaint of said plaintiff herein filed, and, according to his information and belief, denies that the said plaintiff was at any time before or on the 2d day of April, 1862, or has been at any time since, or is now, the true or lawful owner in fee simple or otherwise of the lot of land particularly described in his said complaint or any part thereof; and,
18 according to his like information and belief, denies that said plaintiff was on said 2d day of April, 1862, in the lawful, peaceable, and quiet possession, or in any possession whatever, of said lot of ground; and in like manner denies that the said plaintiff then had been in such possession, or in any possession whatever, for the full space and term of seven years then next preceding; but this defendant, according to his information and belief, alleges that, on the contrary thereof, all acts of possession which have at any time been exercised upon or over said lot of ground by said plaintiff, if any have been so exercised, have been acts of intrusion, trespass, and wrong upon the possession and right of possession, as against said plaintiff, of the prior and first occupants and possessors of said lot, and upon the true and lawful owners thereof, which prior occupants and possessors had not then nor theretofore voluntarily abandoned their said prior possession, nor their claim nor right to the possession thereof, but prior to the 28th day of March, 1862, duly conveyed the same to James E. Munford hereinafter mentioned. And said defendants further denies that on said second day of April, 1862, or at any other time, he with force and arms, without lawful right or authority or otherwise, unlawfully, unjustly, or otherwise, entered into and upon said premises, and unlawfully or otherwise took possession of
19 the same, and ousted or expelled the said plaintiff therefron, and denies that he unlawfully or otherwise has withheld or now withholds said premises from said plaintiff to his damage in the sum of five hundred dollars, or in any other sum, and, according to his information and belief, denies that the reasonable value of the use of said premises is twenty-five dollars per month.

And for a further and separate answer to said complaint said defendant, according to his information and belief, says that by virtue and effect of the treaty of peace, friendship, limits, and settlement between the United States and the Mexican republic, dated at Guadalupe Hidalgo, February 2d, 1848, the ownership and title in fee simple of said lot of ground described in said complaint passed to and became vested in the said United States, and that the said United States afterwards, by force and effect of the act of the Congress thereof, passed March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and by force and effect of the final decision and decree of the board of commissioners of said United States, appointed and acting thereunder, (upon the petition and claim of the city of San Francisco, presented to and filed before said board
19½ in favor of said city,) the said ownership and title in fee so acquired and held by the United States passed to and vested in the city of San Francisco, and that by divers mesne conveyances, since duly executed and delivered, and by force and effect of divers ordinances of said city of San Francisco, and an act or acts of the legislature of California, duly passed,

the said ownership and title in fee in and to said lot of ground and premises, had prior to the 28th day of March, A. D. 1862, become, and then was, vested in and held by one James E. Munford, who, by his certain lease in writing, bearing date on that day, and through this defendant as his lawful attorney in fact, duly executed and delivered, granted, demised, and to farmlet the said lot of ground and premises to one John P. Powelson, for the term of twelve calander months from the first day of April, A. D. 1862, thence next ensuing, at the certain rent, and subject to the terms, conditions, stipulations in said lease particularly specified and set forth, under and by the virtue of which lease and demise the said Powelson afterwards, to wit, on or about said 1st day of April, A. D. 1862, lawfully and peacefully entered into and upon said premises, and was lawfully, peacefully, and rightfully possessed thereof, and of his said term therein, and has ever since continued to be, and still is, so lawfully, peaceably, and rightfully possessed thereof.

And said defendant says that all acts done by him with reference to said lot of ground have been done as the agent and attorney of said James E. Munford, and by his authority, and by the license and permission of the said Powelson, his said lessee.

JAMES B. TOWNSEND, *in p. p.*

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

James B. Townsend, being duly sworn, on oath, says that he is the defendant above namnd, and has read the foregoing answer, and knows the contents thereof, and that the same is true of his knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes to be true.

JAMES B. TOWNSEND.

Sworn to and subscribed before me this 18th day of April, A. D. 1862.
[SEAL.] HENRY HAIGHT, *Notary Public.*

21 Endorsed: Received a copy of the within answer this 18th day of April, A. D. 1862.

BURBANK & HUBBARD,
Attorneys for Plaintiff.

Endorsed: Filed April 18th, 1862.

W. BARTLETT, *Clerk,*
By WM. A. SATTERLEE, *D. C.*

22 *Separate answer of Jno. P. Powelson.*

In the district court of the 12th judicial district of California in and for the city and county of San Francisco.

GEORGE G. GREELY, plaintiff,
vs.
POWELSON impleaded, with others, defendants.

And now comes John P. Powelson, on whom a copy of the summons in this action has been served, and for himself separately answers the complaint of said plaintiff therein filed, and, according to his information and belief, denies that the said plaintiff was at any time before or on the second day of April, 1862, or has been at any time since, or is now, the true and lawful owner in fee simple or otherwise of the lot of land particularly described in his said complaint, or of any part thereof; and, according to his

like information and belief, denies that said plaintiff was on said 2d day of April, 1862, in the lawful, peaceable, and quiet possession, or in any possession whatever, of said lot of ground; and in like manner denies that the said plaintiff then had been in such possession, or in any possession whatever, for the full space and term of seven years then next preceding; but this defendant, according to his information and belief, alleges that, on the contrary thereof, all
23 acts of possession which have at any time been exercised upon or over said lot of ground by said plaintiff, if any have been so exercised, have been acts of intrusion, trespass, and wrong upon the possession and right of possession, as against said plaintiff, of the prior and first occupants and possessors of said lot, and upon the true and lawful owners thereof, which prior occupants and possessors had not then nor theretofore voluntarily abandoned their said prior possession, nor their claim, nor their right to the possession thereof, but prior to the 28th day of March, 1862, duly conveyed the same to James E. Munford, hereinafter mentioned. And said defendant further denies that on said 2d day of April, 1862, or at any other time, he with force and arms, or without lawful right or authority, or unlawfully or unjustly entered into and upon said premises, or unlawfully took possession of the same, and ousted or expelled the said plaintiff therefrom, and denies that he has unlawfully withheld, or now unlawfully withholds, said premises from said plaintiff to his damage to the sum of five hundred dollars, or in any other sum; and, according to his information and belief, denies that the reasonable value of the use of said premises is twenty-five dollars per month.

And for a further and separate answer to said complaint said defendant, according to his information and belief, says that by virtue and effect
24 of the "treaty of peace, friendship, limits, and settlement between the United States of America and the Mexican republic, dated at Guadalupe Hidalgo, February 2, 1848, the ownership and title in fee simple of said lot of ground described in said complaint passed to and became vested in the United States, and that the said United States afterwards, by force and effect of the act of the Congress thereof passed March 3, 1851, entitled an "act to ascertain and settle the private land claims in the State of California," and by force and effect of the final decision and decree of the board of commissioners of said United States, appointed and acting thereunder, (upon the petition and claim of the city of San Francisco presented to and filed before the said board) in favor of said city, the said ownership and title in fee so acquired and held by the said United States passed to and became vested in the said city of San Francisco, and that by divers mesne conveyances, since duly executed and delivered, and by force and effect of divers ordinances of said city of San Francisco, and an act or acts of the legislature of California, duly passed, the ownership and title in fee in and to said lot of ground and premises had prior to the 28 day of March, A. D. 1862, become and then was vested in and held by one James E. Munford, who by his certain lease in writing, bearing date on that
25 day, and duly executed and delivered, granted, demised, and to farm-let the said lot of ground and premises to this defendant, the said Powelson, for the term of twelve calendar months from the first day of April, A. D. 1862, thence next ensuing, at the certain rent and subject to the terms, conditions, and stipulations in said lease particularly specified and set forth, a copy of which lease is hereto annexed, marked "Exhibit A," and made part hereof, under and by virtue of which lease and demise he, the said Powelson, afterwards, to wit, on or about said 1st day of April, A. D. 1862, lawfully and peacefully entered into and upon said premises, and was lawfully, and peacefully, and rightfully seized thereof, and of his said term therein, and has ever since continued to be, and still is, so lawfully, peace-

fully, and rightfully possessed thereof, which are the same supposed trespasses and grievances by said plaintiff complained of in his said complaint.

JOHN P. POWELSON.

26 CITY AND COUNTY OF SAN FRANCISCO, *ss:*

The said John P. Powelson, being duly sworn, on his oath, says that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes to be true.

JOHN P. POWELSON.

[SEAL.] Sworn to and subscribed before me this 25th day of April, A. D. 1862.

HENRY HAIGHT, *Notary Public.*

"*Exhibit A.*"

This indenture, made and entered into this twenty-eighth day of March, A. D. one thousand eight hundred and sixty-two, between James E. Munford, of the city and county of St. Louis, State of Missouri, party of the first part, and John P. Powelson of the city and county of San Francisco, State of California, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part and behalf of the party of the second part, his executors, administrators, and assigns
27 to be paid, kept, and performed, has granted, demised, and to farm leten , and by these presents does grant, demise, and to farmlet unto the said party of the second part, his executors, administrators, and assigns, all that certain lot of ground situated and being in said city and county of San Francisco, State of California, which is bounded and described as follows, to wit: Commencing at the point where the western line of Leavenworth street intersects the southern line of Clay street; thence westerly along said line of Clay street, one hundred and thirty-seven and a half feet, (137½;) thence southwardly, parallel to said line of Leavenworth street, one hundred thirty seven and a half feet, (137½;) thence eastwardly, parallel to said line of Clay street, one hundred and thirty-seven and a half feet, (137½,) to said line of Leavenworth street; thence northwardly along said line of Leavenworth street, one hundred and thirty-seven and a half feet, (137½,) to said point of commencement, said lot being number eleven hundred and eighty-eight, (1188) of the fifty-vara survey of said city, as numbered and represented on the official map or plan thereof, together with the improvements thereon situated.

To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his execu-
28 tors, administrators, and assigns, from the first (1st) day of April, one thousand eight hundred and sixty-two, for and during the full term of twelve calendar months thence next ensuing, and fully to be complete and ended, yielding and paying therefor unto the said party of the first part, his heirs and assigns, during the said term hereby granted, the monthly rent or sum of six dollars, payable in advance, at the office of James B. Townsend, esq., in said city and county of San Francisco, on the first day of each and every month during the said term; provided always, nevertheless, that if the rent above reserved, or any part thereof, shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid, or if default

shall be made in any of the covenants herein contained, on the part or behalf of the party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed, then and from thenceforth it shall and may be lawful for the said party of the first part, his heirs or assigns, unto and upon the said demised premises, and every part thereof, wholly to re-enter, and the same to have again, repossess, and enjoy as his first and former estate, anything heretofore contained to the contrary thereof in anywise notwithstanding And the said party of the second part, for
29 himself and his heirs, executors, and administrators, doth covenant and agree to and with said party of the first part, his heirs, and assigns, by these presents, that the said party of the second part, his executors, administrators, or assigns, shall and will during the term hereby granted, well and truly pay, or cause to be paid, unto the said party of the first part, his heirs, or assigns, the said above reserved rent on the days and in the manner limited and prescribed as aforesaid, for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents; and on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators, and assigns, shall and will peaceably and quietly leave, surrender, and yield up unto the said party of the first part, his heirs, or assigns, all and singular the said demised premises, reasonable use and wear thereof and damage by the elements expected. And the said party of the first part, for himself and his heirs or assigns, doth hereby covenant and agree that the said part of the second part, his executors, administrators, or assigns, paying the above reserved rent, and performing the above covenants and agreements aforesaid, the said
30 party of the second part, his executors, administrators, and assigns, shall and may at all times, during the said term hereby granted, peaceably and quietly have, hold, and enjoy the said demised premises, without any manner of let, suit, trouble or hinderance of or from the said party of the first part, his heirs or assigns. And the said party of the second part agrees not to suffer or commit any waste of said demised premises nor any nuisance thereon, and not to sub-let, assign, transfer, or in any manner part with the term hereby created, nor the possession of said premises, nor any part thereof, nor any interest in either, without the written consent of the said party of the first part first obtained.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

JAMES E. MUNFORD, [SEAL.]
By JAMES B. TOWNSEND,
His att'y in fact.
J. P. POWELSON. [SEAL.]

Signed, sealed, and delivered in presence of—
H. W. CLARK.

Endorsed: Received a copy of the within answer this 25th day of April, A. D. 1862.

BURBANK & HUBBARD, *Att'y for Pl'ffs.*

Endorsed: Filed April 25th, 1862.

W. BARTLETT, *Clerk,*
By WM. R. SATTERLEE, *D. C.*

Replication to separate answer of Jas. B. Townsend.

In the district court of the twelfth judicial district in and for the city and county of San Francisco, and State of California.

GEORGE G. GREELY, plaintiff,
vs.
JAMES B. TOWNSEND and others, defendants.

And now comes the said plaintiff, and in reply to the separate answer of said defendant, James B. Townsend herein, upon his information and belief, denies that all acts, or any act, of possession exercised at any time upon or over said lot of ground by said plaintiff, or by those under or through whom he claims said premises, have been acts of intrusion, trespass, or wrong upon the possession or right of possession of any prior or first occupants or possessors of said premises, or upon the true or lawful owner or owners thereof; and, upon his information or belief, plaintiff denies that any such prior or first occupants or possessors of said premises, or such true or lawful owners thereof as are contemplated in said answer, have at any time had an existence, and denies, on his information and belief, that they at any time conveyed the same to said James E. Munford as in said answer
32 alleged

And this plaintiff, further replying to said separate answer, upon information and belief, denies that by virtue or by the effect of the treaty of peace, friendship, limits, and settlement between the United States of America and the Mexican republic, dated at Guadalupe Hidalgo, February 2, 1848, or by any other means, the ownership or title of any kind of, in, or to said lot of ground described in said complaint passed to or became vested in the said United States; and, on information and belief, denies that by force or effect of the act of the Congress of the United States passed March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," or by force or effect of the final decision or decree of the board of commissioners of said United States, acting under said act of Congress, or in any other manner or by any other means, any title or ownership of, in, or to said lot of ground held by the United States passed to or became vested in said city of San Francisco; and denies that said United States ever had or held any ownership or title of any character of, in, or to said lot of ground in said complaint described; and this plaintiff upon information and belief further denies that by any mesne conveyances or by force or effect of any ordinance or ordinances of said city of San Francisco, or any act or acts of the leg slature of California, or by any other
33 means, the ownership or title in fee, or any title or interest, possession or right of possession of, in, or to said lot of ground or premises had prior to the 28th day of March, A. D. 1862, or at any time, become, and that it at any time was, vested in or held by said James E. Munford, and upon information and belief, denies that said Munford granted, demised, or to farmlet said lot of ground or premises to said John P. Powelson for any term whatever, and denies that under or by virtue of said lease or demise, or by any other lawful authority whatever, said Powelson at any time lawfully or peacefully entered into or upon said premises, or was lawfully, peacefully, or rightfully possessed thereof, or of any term therein, and denies that he has since continued to be or has at any time been, or now is, lawfully, peacefully, or rightfully possessed thereof.

And said plaintiff, for a further reply to the said separate answer of the said defendant, Townsend, on information and belief avers that neither said defendant Townsend, nor the said John P. Powelson, nor the said James E. Munford, nor any ancestor, predecessor, or grantor of them, or either of

them, was siezed or possessed of the said lot of land or premises in said complaint herein described within five years before the said unlawful entry by said defendant Townsend into and upon said lot and premises as stated in said complaint; and on information *and on information* and belief
34 further avers that no title to said lot and premises derived from either the Spanish or Mexican government has been confirmed by the government of the United States or by its authorities within five years before the commencement of this action, or within five years before said unlawful entry by said defendant Townsend, upon and into said described lot and premises, as charged in plaintiff's complaint herein.

BURBANK & HUBBARD, *pl'ffs Att'ys.*

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

George G. Greely, being duly sworn, says that he is the plaintiff named in the above-entitled cause; that he has heard his foregoing complaint read and knows the contents thereof; that the same is true of his own knowledge, except as to those matters herein stated on information or belief, and that as to those matters he believes it to be true.

GEORGE G. GREELY.

35 Sworn, &c., this 26th day of April, A. D. 1862, before me,
[SEAL.] ALEXANDER BOYD, *Notary Public.*

Endorsed: "April 28th, 1862, received a copy of the written replication.

"JAMES B. TOWNSEND."

Endorsed: Filed April 28th, 1862.

W. BARTLETT, *Cl'k,*
By WM. R. SATTERLEE, *D. C.*

36 *Demurrer of deft. Powelson, to pl'ff's 3d replication.*

In the district court of the 12th judicial district in and for the city and county of San Francisco.

GEO. G. GREELY, pl'ff,
vs.
POWELSON, impleaded with others, def'ts.

And now comes the said P. Powelson, and demurs to the replication of said plaintiff, by him thirdly and lastly above pleaded, and for causes of demurrer specifies as follows, to wit:

1st. That said replication purports to be a reply to the whole separate answer of this defendant; whereas it states no facts sufficient to bar or preclude said defendant from maintaining the defence by him firstly above pleaded, and set up in his said separate answer.

2nd. That said replication does not state facts sufficient to preclude this defendant from maintaining the defence by him, in his said separate answer secondly above pleaded and set up; that it does not show that the title to said premises described in said complaint was not derived from
37 the Spanish or Mexican government, nor that the title to said premises was not confirmed by the government of the United States or its authorities, within five years before the commencement of this action.

J. P. POWELSON.

Endorsed: "Due service of the within demurrer is hereby admitted, June 6th, A. D. 1862

BURBANK & HUBBARD, *Pl'ff's Att's.*

Endorsed: Filed June 6, 1862.

W. BARTLETT, *Cl'k,*
By WM. R. SATTERLEE, *D. C.*

38 *Demurrer of def't Townsend to pl'ff's 3d replication.*

In the district court of the 12th judicial district in and for the city and county of San Francisco.

GEORGE G. GREELY, plaintiff,
vs.
JAMES B. TOWNSEND, impleaded with others, deft's.

And now comes the said Townsend, and demurs to the replication of said plaintiff, by him thirdly and lastly above pleaded, and for causes of demurrer specifies as follows, to wit:

1st. That said replication purports to be a reply to the whole separate answer of this defendant; whereas it states no facts sufficient to bar or preclude said defendant from maintaining the defence by him firstly above pleaded and set up in his said separate answer.

2nd. That said replication does not state facts sufficient to preclude this defendant from maintaining the defence by him in his said separate answer secondly above pleaded and set up; that it does not show that the title to said premises described in said complaint was not "derived from the Spanish or Mexican government," nor that the title to said premises
39 was not confirmed by the government of the United States or its authorities within five years before the commencement of this action."

JAMES B. TOWNSEND, *in pro. pers.*

Endorsed: Due service of the within demurrer is hereby admitted, June 5th, 1862.

BURBANK & HUBBARD, *Plff's Att'ys.*

Endorsed: Filed June 5th, 1862.

W. BARTLETT, *Clk,*
By WM. R. SATTERLEE, *D. C.*

40 *Replication to separate answer of def't Powelson.*

In the district court of the 12th judicial district in and for the city and county of San Francisco, and State of California.

GEORGE G. GREELY, plaintiff,
vs.
JAMES B. TOWNSEND, —— POWELSON, *et al.*, defendants.

And now comes the said plaintiff, and in reply to the said separate answer of said defendant, John P. Powelson, herein, upon information and belief, denies that all acts or any act of possession exercised at any time, upon or over said lot of ground by said plaintiff, or by those under or through whom he claims said premises, have been acts of intrusion, trespass or wrong upon the possession or right of possession of any prior or first occupants or possessors of said premises, or upon the true or lawful owner or owners thereof; and, upon information and belief, denies that any such prior or first occupants, or possessors of said premises, or such true or lawful owners thereof as are contemplated in said answer, have at any time had an existence, and that they at any time conveyed the same
41 to said James E. Munford, as is in said answer alleged, the ownership, or title in fee, or any title interest, or right of possession of, in, or to said lot of ground or premises, had prior to the 28th day of March, A. D. 1862, or at any time, become, and that it any time was, vested in or

held by the said James E. Munford; and, upon information and belief, denies that said Munford granted, demised, or to farmlet said lot of ground or premises to said defendant Powelson, for any term whatever; and, upon information and belief, denies that under or by virtue of said lease or demise, or by any other lawful authority whatever, said Powelson at any time lawfully or peacefully entered into or upon said premises, or was lawfully or peacefully, or rightfully possessed thereof, or of any term therein, and denies that he has since continued to be, or has at any time been, or now is lawfully, peacefully, or rightfully possessed thereof; and plaintiff, upon information and belief, denies that that pretended lease, a copy of which is annexed to said defendant Powelson's separate answer, is the act and deed of him, the said James E. Munford, and that the same was executed by him or his authority.

And said plaintiff, for a further reply to the said separate answer of the said defendant John P. Powelson, nor the said James E. Munford, nor
42 any ancestor, predecessor, or grantee of them or either of them; and this plaintiff, further replying to said separate answer, upon information and belief, denies that by virtue or that by effect of the treaty of peace, friendship, limits, and settlement between the United States of America and the Mexican republic, dated at Guadalupe Hidalgo, February 2nd, 1848, or by any other means, the ownership or title of any kind of, in, or to said lot of ground described in said complaint, passed to or became vested in the said United States; and, upon information and belief, denies that by force or effect of the act of the Congress of the United States passed March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," or by force or effect of the final decision or decree of the board of commissioners of said United States, acting under said act of Congress, or in any other manner, or by any other means, any title or ownership of, in, or to said lot of ground, held by the said United States, passed to or became vested in the said city of San Francisco, and denies that said United States ever had or held any ownership, or title of any character of, in, or to said lot of land in said complaint described; and plaintiff denies, upon information and belief, that by any mesne conveyances, or by force or effect of any ordinance or ordinances of said city of San Francisco, or any act or acts of the legislature of Cali-
43 fornia, or by any other means was seized or possessed of the said lot of land or premises in said complaint described herein, within five years before the said unlawful entry of said defendant Powelson into and upon said lot and premises as stated in said complaint; and further avers, upon information and belief, that no title to said lot or premises derived from either the Spanish or the Mexican government has been confirmed by the government of the United States, or by its authorities, within five years before the commencement of this action, or within five years before the said unlawful entry by said defendant Powelson upon and into said described lot and premises, as charged in plaintiff's complaint herein.

BURBANK & HUBBARD, *Pl'ff's Att'ys.*

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

George G. Greely, being du'y sw rn, says that he is the plaintiff in the cause above entitled; that he has heard his foregoing replication read, and knows the contents thereof; that the same is true of his own knowledge, except as to matters stated therein on information and belief, and that as to
44 those matters he believes it to be true.

"GEORGE G GREELY.

Sworn, &c., this 30th day of April, A. D. 1862, before me.
[SEAL.] ALEXANDER BOYD, *Notary Public.*

Endorsed: "Service on me of a copy of the within replication is admitted May 2d, 1862.
"JOHN P. POWELSON."

Endorsed: "Filed June 18, 1862.
"W. BARTLETT, *Clk,*
"By WM. R. SATTERLEE, *D. C.*"

45 *Order submitting demurrer to 3d replication for consideration and decision.*

In the district court of the 12th judicial district of the State of California in and for the city and county of San Francisco, September term, A. D. 1862.
Present: Hon Lorenzo Sawyer, judge.

GEORGE G. GREELY *vs.* JAMES B. TOWNSEND *et al.* } Wednesday, October 1st, A. D. 1862.

On motion, and by consent of counsel of the respective parties hereto, the demurrer of the defendant to the third replication herein was submitted to the court for consideration and decision upon briefs to be filed within two days.

46 *Order sustaining demurrer to 3d replication.*

In the district court of the 12th judicial district of the State of California in and for the city and county of San Francisco, September term, A. D. 1862.
Present: Hon. Lorenzo Sawyer, judge.

GEORGE G. GREELY *vs.* JAMES B. TOWNSEND *et al.* } Saturday, October 18, A D. 1862.

In this cause, heretofore submitted to the court for consideration and decision, it is now ordered that the demurrer to the third replication herein be, and it is hereby, sustained, with leave to plaintiff to amend within ten days upon payment of $20 00 costs.

47 *Judgment.*

In the district court of the 12th judicial district of the State of California in and for the city and county of San Francisco.

GEORGE G. GREELY *vs.* JAMES B. TOWNSEND, JOHN P. POWELSON, and CHARLES GEDDES. } No. 9653.—Judgment rendered November 28, 1862.

This action having been dismissed as to the defendant, Charles Geddes, upon motion of plaintiff's counsel in open court, and said cause being at issue as to the remaining two defendants, and coming on regularly for trial in its order upon the calendar, Mr. Burbank appeared as counsel for plaintiff and Messrs McHenry and Townsend for the defendants, Townsend and Powelson. The following jurors were duly impanelled, accepted, and sworn as the jury to try this cause, viz: S. H. Williams, R. Bruce, Henry Buckman, A. Smith, T. Welsh, J. B. Lewellen, H. Lockwood, B. E. Bowman, Thomas Boyce,

C. Curtin, H. Hugg, and S. Barrell; whereupon Earnest Heyn, Harry Garthwaite, H. D. Carlton, William Barry, Moses Whitcomb, Charles Gettys, Charles Van Antwert, J. B. Townsend, George Y. Loring, Charles A. Spaulding, Festus O'Donnell, Joseph S. Simmons, Henry E. Carlton, witnesses
48 on the part of the plaintiff, and Andrew Williams, John Laws, John W. Morton, William H. Hyde, John Murray, Anthony Byer, D. B. Hughes, Harrison P. Ayers, Lewis Lakman, Jasper F. Smith, and Leonard R. Hodgkins, witnesses on the part of the defendants, were duly sworn and examined, and after the arguments of the counsel of the respective parties and the charge of the court the jury retired to deliberate upon their verdict, and subsequently returned into court and say they find for plaintiff against both defendants. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that George G. Greely, plaintiff, do have and recover of and from James B. Townsend and John P. Powelson, defendants, the possession of the land and premises described in said plaintiff's complaint, as follows, to wit: "That certain lot of land situate, lying, and being in the city and county of San Francisco; said lot of ground being a portion of fifty-vara lot, numbered on the official map of said city eleven hundred and eighty-eight, (1188,) and bounded as follows: Commencing on the southerly line of Clay street at a point sixty-eight feet and nine inches westerly from the southwest corner of Clay and Leavenworth streets; thence running westerly on said southerly line
49 of Clay street sixty-eight feet and nine inches, (68 ft. 9 in.;) thence southerly and parallel with Leavenworth street one hundred and thirty-seven feet and six inches, (137 ft. 6 in.;) thence easterly and parallel with Clay street sixty-eight feet and nine inches, (68 ft. 9 in.;) thence northerly and parallel with Leavenworth street one hundred and thirty-seven feet and six inches, (137 ft. 6 in.,) to the place of beginning, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of two hundred and four 75-100 dollars ($204 75.) And it is further ordered that said plaintiff have his writ of restitution for said premises and execution for said costs and disbursements. And it is further ordered, adjudged, and decreed that this action be, and it is hereby, dismissed as to the defendant, Charles Geddes.

Judgment recorded November 29, A. D. 1862.

50 *Clerk's certificate.*

District court of the 12th judicial district of the State of California in and for the city and county of San Francisco.

GEORGE G. GREELY
vs.
JAMES B. TOWNSEND *et als.*

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, W. Bartlett, county clerk of the city and county of San Francisco, State of California, and ex officio clerk of the district court of the twelfth judicial district thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in Judgment Book E of said court, at page 72. And I further certify that the foregoing papers hereto annexed, constitute the judgment roll in said cause.

Witness my hand and the seal of said district court this 29th
[SEAL.] day of November, A. D. 1862.

WASHINGTON BARTLETT, *Clerk,*
By B. C. DUER, *Deputy Clerk.*

Endorsed: "Judgment roll filed this 29th day of November, A. D. 1862.
"WASHINGTON BARTLETT, *Clk*,
"By B. C. DUER, *Deputy Clk*."

51 *Notice of intention to move for new trial.*

In the district court of the 12th judicial district in and for the city and county of San Francisco.

GEORGE G. GREELY, pl'ff,
vs.
JAMES B. TOWNSEND AND JOHN P. POWELSON, def'ts.

The above-named plaintiffs will take notice that the above-named defendants intend to move for a new trial of said cause.
San Francisco, December 3d, 1862.

JAMES B. TOWNSEND.
JOHN P. POWELSON.

Endorsed: Received a copy of the within notice of intention to move for a new trial this 3d day of December, A. D. 1862.
BURBANK & HUBBARD,
Att'ys for Pl'ffs.

Endorsed: Filed Dec. 8th, 1862.
W. BARTLETT, *Clk*,
By WM. R. SATTERLEE, *D. C.*

52 *Engrossed statement for new trial.*

In the district court of the 12th judicial district of California in and for the city and county of San Francisco.

GEORGE G. GREELY, pl'ff,
vs.
JAMES B. TOWNSEND AND JOHN P. POWELSON, def'ts.

And now come the said defendants and move, and each for himself separately moves, the court to vacate and set aside the verdict rendered herein, and for a new trial of said cause for the following grounds, to wit:

I. Errors in law committed by the court on the trial of said cause, and which were excepted to by said defendants—

1st. In ruling in and admitting to the jury evidence on behalf of said plaintiff, which was objected by said defendants, and was illegal and ought not to have been admitted.

2nd. In denying defendants notion to strike out the deeds given in evidence by said plaintiffs.

3rd. In refusing to nonsuit said plaintiff as to both of said defendants.

4th. In refusing to nonsuit first plaintiff as to said defendant Townsend.

5th. In ruling out and excluding from the jury the evidence offered
53 by said defendants to prove that the title to the premises in dispute had passed from the United States to the city of San Francisco, and in ruling out and excluding from the jury the further evidence offered by said defendants to prove that said title had been acquired from said city by James E. Munford.

6th. In ruling out and excluding from the jury other legal and competent evidence offered on behalf of said defendants.

7th. In refusing to strike out the evidence, given by plaintiff, of acts, ownership, or possession, exercised over the east half of said fifty-vara lot

No. 1188, subsequent to the date of the first deed given in evidence by said plaintiff.

8th. In charging the jury illegally and improperly upon its own motion.

9th. In giving to the jury illegal and improper instructions asked by said plaintiff

10th. In refusing to give to the jury legal and proper instructions asked by the said defendants.

II. Insufficiency of the evidence given on said trial to justify the verdict of the jury which was rendered, 1st, as against either of said defendants; 2d, as against said defendant Townsend.

54 III. That said verdict is against law.

Statement of facts in support of said motion.

The trial of said cause commenced on the 21st day of November, A. D. 1862.

The following are the facts which occurred on said trial, and the evidence given and offered.

After the empanelling and swearing of the jury to try the issues joined in said action, between said parties, plaintiff and defendants, and after a statement of plaintiff's case to the jury, by Caleb Burbank, esquire, one of his attorneys, and said plaintiff called as a witness, on his behalf one Ernest Hayn, who, being duly sworn, testified as follows.

Testimony of Ernest Hayn on behalf of plaintiff.

I have resided on the south side of Clay street, in this city, since August, 1853. I know the west half of fifty-vara lot No. 1188; my lot joins it on the west. Fifty-vara lot 1188 is situated on the southwest corner of Clay and Leavenworth streets. I built a fence along the whole line of my lot, next to this lot; between this lot and mine; a picket fence. I built it in 1853 and have kept it up ever since, and it is there now. I know a fence on the north side of the lot in question, running towards Leavenworth; I think that fence was put up in the early part of 1854; it was made of

55 posts and timbers; I believe about two by three; posts, set, I suppose, about 8 or 10 feet apart; don't know exactly. This fence was along the line of Clay street; on the south line of it was fenced at the same time; that is, in the early part of 1854. I knew a fence on Leavenworth street, on the east side of the fifty-vara lot; it was built at the same time; it was a fence of posts and one rail on the top of the posts. I don't remember whether there was a rail below or not. This fence and the others mentioned entirely enclosed this fifty-vara lot. I know of a small house on this fifty-vara lot. I know of a small house on the lot; this was built within six or eight months after, perhaps, about some time, house on the lot now. It stood on the east half of the fifty-vara lot near Leavenworth street. Mr. Carlton occupied it as a carpenter shop. It stood about midway on the Leavenworth street line of said fifty-vara lot. I don't know of anybody being on this lot or doing anything with it but Mr. Carlton. He worked in the little house there, and had his tools there; I saw him there and talked with him. The fence on Clay street has been several times down and away, and afterwards replaced again. I don't know if it was ever all down. Where it was replaced I don't know who did it. In the early part of the year 1857, I think it was Mr. Carlton put a picket fence around

56 this fifty-vara lot; a good substantial picket fence I saw Mr. Carlton there then helping to put it up. It extended the whole length of the fifty-vara lot on Leavenworth and Clay streets, and with my fence on the west and the fence of the adjoining fifty-vara lot on the south made an

enclosure of this fifty-vara lot. This fence remained there standing and lying on the ground until the other folks moved the house on, which is now there. That house was moved on some six, seven, or eight months since, I think. The street was graded there about two years ago; it was graded a little about six or eight years ago, and some few years since graded down to the established city grade; this last grading was done some two years ago, I think. The last grading was some five or six feet deep on Leavenworth street on an average. The condition of the fence in the last of March or first of April last was that it had partly fallen down. It fell down into the street of account of the grading and sand blowing away. It fell down towards the street. When grading the street they dug up close to the fence, and the sand blew out more and more, and at length it fell. I suppose the falling was caused by the severe winds and sand blowing out. I saw Mr. Carlton's son and Mr. Greely at work on the lot putting up the fence one time as I passed; a severe storm had blown the fence down
57 and they were putting it up. The house was moved to the southerly line of the fifty-vara lot, but I don't recollect the exact time.

Cross-examination of E. Hayn.

On cross-examination said witness testified as follows:

I saw Carlton's son and Greely putting up the fence some two or three years ago. It was the second fence, that is the picket fence, that I saw them putting up. It was a year when we had severe winds. It was not down altogether, but down in places and they were putting it up. The lot to the south of No. 1188 formerly belonged to Carlton and, until about three years since when he sold it to Mr. Garthwaite. Garthwaite has lived there about five years; was a tenant of Carlton about two years, and then bought the place. I don't remember the date when the fence on Leavenworth street fell down from the grading. The house now on the lot in which Powelson lives was moved there about seven or eight months ago. The fence was down for five or six months before that house was moved on the lot. I know of no one but Carlton using the carpenter shop; it remained there a year, more or less; I can't state how long. I think I saw the fence there in the early part of 1854. I think it was made of sawed posts, 2 by 3, or 3 by 4, with a piece nailed on the top of the posts, which I think was 2 by
58 3. I don't recollect whether there was any board on the side or not; don't recollect the sides, but I recollect the top very well. I saw some folks one morning carrying off some of the top pieces, and I forbade them, and by that I remember. I saw this fence there from time to time, till I went to Sacramento in 1857, and was absent there one year. I don't know anything about the lot during that time. The next that I know of it was when the picket fence was put up; the picket fence was put up in 1857. I did not see the first fence put up on this fifty-vara lot; I don't know who put it up. I think the little carpenter's shop was put up in 1855, in the summer season of that year, I think June or July. I think it was in the summer of 1855 when I saw Carlton there, and stopped and talked with him. I never knew that little house used for any other purpose, except as a shop. When it was moved down to Mr. Garthwaite's lot I don't know what use he made of it. It may have remained about a year before it was removed down to the lot on the south side. I don't know of Carlton's using it for any other than a shop.

Testimony of Henry Garthwaite on behalf of plaintiff.

Plaintiff then called as a witness on his behalf, one Henry Garthwaite who, being sworn, testified as follows:

59 I lived on Leavenworth street on the lot next south of and adjoining fifty-vara lot number 1188. I have lived there since March, 1858. I know the fifty-vara lot 1188, on the southwest corner of Clay and Leavenworth streets. There was a fence around it when I went to live on Leavenworth street in 1858. It was partly picket and part rail fence. On Clay and Leavenworth streets it was a rail fence, and a picket fence on the dividing line between the lot I occupied and 1188. When I took possession of the house and lot south of 1188, as tenant of Henry E. Carlton, in March, 1858, I had the privilege of using this lot to turn my horse in. I hired that house and lot south of 1188, from Loring D. Mason, who acted as agent of H. E. Carlton, to whom I paid rent. I continued to occupy it from that time, 1858, until I bought. The use of the lot was given me as a privilege, and I had it to turn my horse in up to the time that the fence fell down when the street was graded, after which I did not use it because I could not. The house now on the lot 1188 was put there about six or seven months ago. I saw it on the street as I went home about six o'clock. I saw it on lot 1188, the next afternoon when I went home. I think a portion of the fence was still there when this house was moved on; it had fallen down; should think it fell from the grading. The fence on Clay street
60 and that next to Mr. Hayn's lot and next to mine were up when this house was moved on. There was a small building or shanty on the side of the lot I bought of Carlton, which extended from that lot over a few feet. It was not large enough for my uses; and I made an addition to it, and occupied it.

Cross-examination.

On cross-examination said witness testified as follows:

I bought the lot adjoining 1188 on the south, that is, the house, lot, and all the buildings on it. My lot is 117½ feet front on Leavenworth street. I bought 77½ feet on Leavenworth street by about 60 feet deep, adjoining 1188, from H. E. Carlton. I can't tell exactly when I bought it; it was about two years ago; the recording of the deed will show when it was. I went to reside there in March, 1858; hired the place at first, afterwards bought it. I did not buy any portion of the fifty-vara lot 1188, but had the privilege of using it. There was a fence between my lot and 1188, and I had a gate through this fence between my lot and 1188, but when the fence on Leavenworth street fell down from the grading I could no longer use the lot. When I first went to live on Carlton's lot there was a post and board fence along Clay and Leavenworth streets; posts and two boards, don't recollect distinctly; it is a long time ago. I think one of the
61 boards was nailed on the top of the posts. I knew nothing about the title to lot 1188. Mr. Carlton gave me permission to use it. The fence which I repaired was a portion which fell down into my yard; I fixed it up in different places. The picket fence that was afterwards put up fell down in consequence of the grading of the streets. Powelson's house was on the street the evening before it was moved. I did not see it moved. In the morning I went out the back way of my house, and did not see this house. I did not look in the morning, or go where I could see it.

On re-examination by said plaintiff's attorney, said witness said:

The defendant Powelson was living in the house the day after it was moved on the lot.

Testimony of H. D. Carlton on behalf of plaintiff.

Plaintiff then called, as a witness on his own behalf, one H. D. Carlton, who testified as follows:

I am the son of Henry E. Carlton. I came to California in the early part of 1854. My father at that time lived on Leavenworth street in San Francisco. I know fifty-vara lot 1188. I know there was a fence on Clay and Leavenworth streets there in 1854, soon after I arrived. I know that
62 my father ordered some lumber there and sent a couple of men there to put up the fence. I don't recollect the name of either of these men; I knew them at the time. The fence was of squared sawered posts, a cap on the top two by three, and another single rail below. This was the fence on Clay and Leavenworth streets; this fence or portion of it, remained there until we moved from San Francisco to Contra Costa County, which I think was in 1858. The fence was generally kept up, though sometimes it would get down, and once in a while somebody would steal a portion of it. I put it up again when I saw it down. We turned our cow in there, cut the chapparal and bushes which were there for wood, and at one time put some lumber on it. There was a little house put on the lot. It was not very long after the fence was put up; but I cannot say how long after. It was used for a carpenter's shop. It stood a few feet back from the line of Leavenworth street, about midway of the length of the lot on that street. It remained there seven or eight months. It was then moved to the lot on the south side. There was another fence put up there, a picket fence. I can't say when it was built, but I saw it there, when I occasionally came over from Contra Costa County, after we had moved over there in 1858.
63 I was not back here much that year. I think I was on the lot some time last winter, some time in the fore part of the winter; can't say when. It was after Leavenworth street was graded. I know at various times I saw the fence lying in the street, and I hauled portions of it back on the lot. The last time I saw it before this suit was brought it was fallen down into the street, and I hauled parts of it back on the lot.

Cross-examination.

On cross examination said witness testified as follows:

I arrived in California in the early part of 1854. My father was then living on the lot which he sold to Garthwaite, next south of 1188. I saw men putting up the fence on Clay and Leavenworth streets in 1854. I think they were not repairing but putting up a fence. I did not see the remains of a fence at that time. I did not see the lumber which they used hauled there. I saw a wagon unloading there. The fence was built of that lumber. I saw the men put up the fence on Leavenworth street. I cannot recollect their names, nor the name of either of them. Father had built the house on the lot south of 1188 before I arrived. I cannot describe the men who put up the fence. I don't know if they are in San Francisco now. I have never seen them since they put it up. I knew them at the time,
64 but it was a great while ago, and I was then young. I was then only about twelve years old. I am nineteen now. The fence which those men put up was made of posts 4 by 6, with a cap on the top of these posts 2 by 3, and one rail 2 by 3, or a six inch board, I cannot say which, on the side. I don't know where nor of whom the lumber was bought; fence was kept up till we went away; some pieces carried away. The soil was sandy all over lot 1188. There were brush and roots of trees there before the lot was fenced. I got a good portion of our firewood there, but not all. The lot was pretty well covered with such bush and roots. I did not say I got all of our wood there. There were a good many stumps and bushes there.

Testimony of Wm. Barry on behalf of pl'ff.

Plaintiff then called, as a witness on his behalf, one William Barry, who testified as follows:

Cross-exam'd.

On cross-examination said witness testified as follows:

Nothing was said to me about putting the house on in the night. I think something was said about putting it on easily and quietly, something of that kind; some few days elapsed, two or three or more, after I engaged to do the job, before I got the house ready to start. It did not take much time to move it after they started with it for the lot. It was then got on pretty quick. It was to their interest to do it quick so as to get to other jobs. The house was moved from a small street off Mission street, between Second and Third. It was loaded on wheels there. I followed as far as the intersection of Mason and Bush streets. The house was hauled to the
71 lot in the morning. I was not requested by Mr. Townsend nor by any one to move the house or put it on the lot in the night, nor did I employ Hyde & Chester, the contractors, to put it on the lot in the night. I don't recollect that Mr. Townsend gave any instructions except to do it with dispatch, and as quick as possible. I went up to look at the house after complaint was made, and paid something extra for turning it round.

Re-examined.

On re-examination by said plaintiff's attorney, said witness stated as follows:

The forenoon when the house was moved was misty, and I think I heard that five dollars was paid for the men to go on and finish the job notwithstanding the rain.

Re-cross-examined.

On further cross-examination said witness stated:

I don't remember seeing anybody in the house when I went up to look at it. It seems to me like a dream that there was some one. I remember very well Mr. Townsend saying to me that a man had rented the house and lot, and was to occupy it with his family as soon as the house was on the lot. Mr. Townsend had nothing at all to do with the teamster nor with the contractors, nor with the moving of the house. Chester told me that he
72 was going to look to me for five dollars, which had been promised him for finishing the job in the rain. I told him I had nothing to do with it. This five dollars was to go to Hyde & Chester, not to the teamster.

Geo. G. Greeley on behalf of pl'ff.

The said plaintiff, George G. Greely, then offered himself as a witness on his own behalf, and was sworn as testified as follows:

I am the plaintiff in this action. I know fifty-vara lot number 1188. I have known it ever since I bought the western half of it. I did not know much about it before that time. There was a fence on it then; that is, on Clay and Leavenworth streets, made by posts and two rails. There was a picket fence on the other two sides separating this lot from the adjoining lots. I think there was *there was* an opening in the fence between Carlton's house and this lot 1188. I have been at the mines almost ever since I bought. When I went to the mines I left Carlton to look after it. There was a new picket fence put upon Clay and Leavenworth streets in March, 1859. That picket fence was standing there on Clay street till the first part of April last. On Leavenworth street it had fallen down and laid along the bank. When I first bought a portion of the lot I left it in Carlton's
73 care. Last year I left it in care of Mason and Loring. There was a building, used for a carpenter shop, on the fifty-vara lot when I

bought. It was a small building, somewhere about ten feet by fourteen or sixteen. It stood on the eastern half of the fifty-vara lot, near Leavenworth street. It is now on the south side of the lot.

Cross-examined.

On cross examination said plaintiff testified as follows:

I don't own that little building. I have never owned it. I bought the west half of the lot. This building stood on the other half of the lot when I bought the west half. I don't know when it was moved down to Garthwaite's lot. It was moved while I was in the mines. I was in the south part of this city on the first of April last. I was not at the lot at the first of April last. I was there on the 3d or 4th of April. I think I was up at the lot in March last, not long before the first day of April; not over two or three weeks at most. I may have spoken of the fence being up on Clay street on the first of April. I mean it was up on Clay street the last time I saw it before the first. It was down on Leavenworth street after the grading of that street.

74 *Jas. B. Townsend on behalf of pl'ff.*

Said plaintiff then called, as a witness on his behalf, the defendant James B. Townsend, who testified as follows:

I know the parties to this suit. I reside on the corner of Beale and Harrison streets, in this city. I have resided in San Francisco since June, 1852. I know the premises in controversy; that is, the west half of the fifty-vara lot on the southwest corner of Clay and Leavenworth streets. The lot sued for in this action commences sixty-eight feet and nine inches westwardly from the southwest corner of Clay and Leavenworth streets. This fifty-vara lot lies east from Larkin street, and in a northeasterly, or more nearly, I think, in a north-northeasterly direction from Johnson street. It is within the area bounded by Larkin and Johnson streets and the bay of San Francisco. It is within the limits of the city as laid down on any city map made since 1851 which I have seen. I have been up to the fifty-vara lot number 1188 several times; can't state precisely how many. I have been at Powelson's house several times. I was by the lot in March last. I cannot say certainly whether I walked on the lot at that time or not. That was before the house was moved on. The house was moved on that fifty-vara lot about the last of March or the first of April. I think it was
75 the first day of April. I think that I was not on the lot on the first day of April. The last time that I was there in March, and when there next, after the first day of April, I think the picket fence was not down on Clay street, but most, if not all, of it standing. I think the portion of the Clay street fence nearest to Leavenworth street may have been leaning over. Don't think any of the fence on that side of the lot was down flat on the ground. Most of it stood upright, or nearly so, and possibly all of it. My recollection is that the fence was built of sawed posts, like those described by the previous witnesses, with two strips extending between the posts and pickets, nailed on. From its appearance, I should judge that that fence might have been there since 1859. I took no very particular notice of it as to its age. I think I passed by the lot earlier than March last; probably as early as November preceding. I think the fence was in about the same condition when I first saw the lot in November. I cannot say when I first saw the fence there on Clay street, for until I had something to do with the lot I did not pay much attention to the fence. A new fence was put there after Powelson's house was moved on. It was put there by H. W. Clark.

He is in the city, I think. I saw him on Saturday. He put this new
76 fence up on the lot by my direction. He attended the moving of the house, to the fitting of it up after it was put on the lot, and to the building of the new fence, so as to enclose the lot, all by my direction. The direction as to both fitting up the house and putting a fence on the lot, was, I believe, given to him at the same time, and a short time before the house was moved on. The picket fence extended on Clay street nearly or quite the whole length of that side of the fifty-vara lot. I cannot be certain if it came quite to Leavenworth street. My impression is that it came nearly to the corner of Leavenworth and Clay streets, if not quite. I think that when I first saw the fence which had been put up by Mr. Clark it was on Clay street inside of the picket fence. The picket fence, I think, did not stand exactly on the line of Clay street, but diverged towards Leavenworth street, outside of that line a foot or two into Clay street. I don't think I gave any specific directions to build the new fence either inside or outside of the picket fence which stood on Clay street. I directed a fence to be put up so as to enclose the fifty-vara lot. I can't say that I had any idea that a new fence was to be built inside of the picket fence on Clay street. I don't re-
77 member that any conversation took place between myself and Clark about putting a fence inside of the picket fence. If any such conversation did take place, I do not remember it. I would not be positive, however, on the subject. I know the picket fence was there. To make an enclosure of the lot there was not a necessity for two fences on Clay street. The only necessity, if any, or motive for putting a new fence on that street, so far as I can suppose, arose from the fact that Carlton, as I understand, had jumped this lot, which had been previously thereto fenced and taken possession of by James W. Parker, and in order not to make use of any of the materials which Carlton, or any person claiming under him, had put upon the lot. I gave no specific order to Mr. Clark, so far as I recollect, where to put the new fence, but presume it was put up separate by him for the purpose of not making use of any part of the picket fence in enclosing the lot. I have no doubt that Clark had been previously informed that Carlton had jumped the lot when he originally took possession of it. I don't recollect that I gave Clark any specific directions as to whether he should or not put up a fence on the Clay street side of the lot. I don't think I told him that somebody else had fenced the lot and that it was necessary to put a
78 fence inside of the other. I have no recollection of any such conversation. I employed Mr. Clark to attend to the putting of the house on the lot, to the fitting of it up, and to enclose the lot with a fence. There was a picket fence at that time on the west side of the fifty-vara lot, between it and Hayn's lot. Clark did not build a new fence on that side either. When I saw the lot in March, I think there was a fence on the south and west sides of the lot, and on Clay street extending nearly to Leavenworth street. My direction given to Mr. Clark was to fence the lot, or put a fence around it, or to enclose the lot; I cannot be certain about the precise language. I had an idea of the condition of the lot. I don't that my specific instructions were given to Clark as to the place of putting up the fence on either Clay or Leavenworth streets. I supposed, of course, that he would put it up on the line of the street. Clark charged by the day for his work. I don't there was any specific agreement as to the price he was to charge. He had worked for me before. I paid for the lumber—that is, I advanced the money. It was got of a lumberman in San Francisco. Mr. Clark got it and had it taken to the lot. I saw the new fence
79 shortly after it was built. Can't state the day I saw it. The two fences on Clay street stood nearly parallel to each other. I think they were very near to each other at the west end, at Hayn's lot, but the dis-

tance between them widened as they approached Leavenworth street. At Leavenworth street I think they were about two feet apart, and at the west end, next to Hayn's lot, nearly touched each other. I could not say how long they so stood. Portions of the picket fence were there some time after. I was by there not long ago. I think the picket fence was not then standing. A portion of the new fence, I think the grading of Clay street and the blowing away and the caving down of the sand, fell down or leaned over against the bank, and has been recently, I think within a month or two, put up by Mr. Clark. I think the new fence on Clay street now stands a little inside of where the picket fence stood. I employed Mr. Geddes, the witness who has already testified, to put the house on the lot. Mr. Geddes's testimony, as given on the stand, is not entirely correct. I did not tell him, to the best of my recollection and belief, to put the house on the lot quietly. What I told him was, I think, that I wanted a house to put on the lot for
80 Mr. Munford. I purchased the house and took the bill of sale of it to James E. Munford, acting in his name and as his attorney under a power of attorney from him, which I have here in court. I purchased it in his name under a business arrangement between him and myself and took the bill of sale to him.

Plaintiff's counsel, Mr. Burbank, then put to the witness the following question:

Did you purchase that property for Mr. Munford? To which question defendants' counsel, Mr. McHenry, objected, on the ground that the same was immaterial and irrelevant; but the court overruled said objection, to which ruling the defendants then and there excepted. Witness then answered: I purchased it for him, so far as he is interested in it or entitled to it under the arrangement between us to which I have alluded. There is a business arrangement between Mr. Munford and myself. I have his power of attorney, and took the title to him under the arrangement and bought the house for him to that extent.

Plaintiff's counsel, Mr. Burbank, then put to said witness the following question:

Did you purchase that property for yourself? To which question
81 defendants' counsel, Mr. McHenry, objected, on the ground that the same was irrelevant and immaterial. The court overruled said objection, to which ruling defendants then and there excepted. Witness then answered: I consider that I have a beneficial interest in the house, and in the lot also, though the title to both was taken and stands in the name of Mr. Munford. I purchased the house for myself, so far as I am or may hereafter be beneficially interested. The extent of my interest depends upon the future—upon whether the title to the lot and house which Munford holds prevails. The money with which I paid for the house was mine at the time I advanced it. I think the house was purchased on the 25th day of March; that is the date of the bill of sale, and I think it was purchased on that day. I leased this fifty-vara lot in the name of James E. Munford, and as his attorney, to the defendant Powelson, under which lease he took possession of it. James E. Munford did not give me instructions to go upon this particular fifty-vara lot otherwise than by his power of attorney. This power of attorney authorizes me to take, and by suit and all necessary proceedings to recover, possession of all lands and real estate belonging to him at
82 the date of said power or which he should thereafter acquire in the State of California, to lease the same, &c. Mr. Munford resided in St. Louis, Missouri, when I left there for this country, and I believe does still; an attorney-at-law of that city. I am personally acquainted with him. He has never been in this country to my knowledge. He has attended to legal business for me at St. Louis since I left there, and we have corres-

ponded since I have been in San Francisco. His power of attorney to me is dated October 25th, 1857. There is no time limited in it for its continuance. I don't know exactly when Clay street adjoining this lot was graded. I saw some persons at work on it, I think about the fore part of April, or perhaps in March. I am pretty sure I saw some persons at work on it in or about the first part of April. I don't know when the work was commenced nor when it was ended. I leased the fifty-vara lot 1188 to Defendant Powelson for the term of twelve months, commencing April 1st, 1862, at the rate of six dollars per month. He took possession of the lot under that lease. I don't know certainly the day he moved in, but I think I was informed that he moved a portion of his furniture into the house the
83 day it was moved on the lot. I was informed by Mr. Clark, or Powelson, some men had been up about the lot using threatening language, and talking about tearing things to pieces, and I authorized one of them, I don't now recollect which, to obtain a special policeman to stop there a short time to protect the property. I think a policeman stopped there, but I dont recollect for how many nights, nor do I recollect who he was. He came to me and I paid him, my impression is, for two nights.

Cross-exam'd.

On cross-examination said witness stated as follows:

I have in my possession a duplicate of the lease to Powelson, of which I have before spoken. This is it. [Witness here presented said duplicate, and it was marked by the court "No. 1."] The lease was executed in duplicate by myself, as attorney for James E Munford, and by Defendant Powelson, on the day, I think, of its date. One of the duplicates was delivered to said Powelson, and the other retained by me. I am sure it was before the first day of April last that this lease was executed and delivered. I was at said fifty-vara lot number 1188 about the last of March, 1862. I saw no house upon it. There was no entire enclosure of the lot. The lot was not enclosed on the Leavenworth street side. The lot was open on that side. I went by to see the condition of the lot. I have never been in the
84 actual occupation of that lot or of any part of it. I think the house was moved on it on the first day of April last—the same day Powelson's lease commenced. I don't think I was up to the lot during that day. I think I understood that Powelson moved a part of his furniture into the house on that day. There was no other person or persons to my knowledge in possession of said lot on that day. I could not state precisely for how long a time previously to that day the lot had been unoccupied. I think I was there in November, 1860. At that time there was no one on the lot, nor any one in possession of it, or making any use of it, so far as I saw. I saw no house upon it nor any fence enclosing it on the side next to Leavenworth street. It was apparently, and so far as I could discover, lying waste and unoccupied. There was a portion of an old picket fence on Clay street. I do not know of Carlton's ever living on the lot, nor have I any personal knowledge of his having ever occupied it. I don't know to whom the fences on the west and south sides of this lot belong, except from what has been testified in regard to them on this trial.

Re-exam'd.

On re-examination by said plaintiff's attorney said witness stated as follows:

I saw no building that I supposed to be on this lot when I was
85 there before the 1st of April last, nor any that I saw when there shortly after the 1st but the one that had been moved on, and in that

Powelson resided. There was no building that I saw on the premises sued for in this action; that is, on the west half of the fifty-vara lot.

Chas. Van Antwerp, on behalf of pl'ff.

Plaintiff then called, as a witness on his behalf, one Charles Van Antwerp, who testified as follows:

I knew the fifty-vara lot on the southwest corner of Clay and Leavenworth streets. The picket fence along Clay street in April last was in pretty good condition. In the early part of April there was a new fence put up inside of that picket fence on Clay street. These two fences were 3 or 4 feet apart. Mr. Townsend paid me for helping to put up the new fence. I dont remember whether there was a fence on the west side of this lot next Hayn's lot, nor whether there was a fence on the south side of this lot at that time. On Clay street the new fence, I think, ran from the corner of Leavenworth all the way as far as the lot ran.

On cross-examination said witness stated:

Mr. Clark employed me to assist him in putting up the new fence. Mr. Townsend afterwards paid me for my work.

86 *Geo. Y. Loring, on behalf of pl'ff.*

Plaintiff then called, as a witness on his behalf, one George Y. Loring, who testified as follows:

I know the parties to this suit. I reside on Sacramento street, a short distance below Leavenworth street. I lived there in 1854 and 1855; but for the last five years have not lived there, except during the last six or seven months. I lived there for about two years after 1854. Since then I have lived at the corner of Clay and Taylor streets until within the last six or seven months. I know fifty-vara lot number 1188; have known it since about April, 1854. I was in the habit of seeing the lot almost daily from April, 1854, to the present time. The first fence I noticed on this fifty-vara lot was in 1854. This fence was made of sawed posts and a rail on the top, and I think there was one below, though I do not recollect whether it was a board like the top rail. I recollect distinctly the one on the top, for I got over it frequently. On the west side the same fence was there that is there now. It was a picket fence, which had been put up by Hayn, who fenced his lot before this. On the south side there was likewise a picket fence, except a little space where a little street came up. I think a small building was put on the lot not very long after. I saw the fence there. It stood near Leavenworth street, about midway between Carlton's lot, and
87 the line on Clay street. I think Carlton had it put there. After it was built a man slept there for a while, a month or so. I don't know how long. He had a bed there. I used to see him there at that time going in and out at night. Mr. Carlton used this building as a workshop. Carlton used the lot as a corral for his cow. I think it was in 1857 or in 1858 when he moved away. I can't tell from recollection whether he moved away in 1857 or 1858; could tell from my books. I have seen his boys cutting stumps there, and getting out roots for firewood. I recollect seeing them get wood there, but I can't say when or how long. I don't recollect how long the little building remained there. It might have been a year or more. I don't know of its ever having been moved off from it. It is now on it. I don't know of its being moved off. It is now on the south part, about midway of the fifty-vara lot, near the line. And I know that Garthwaite used it for the purpose of putting his cow or hay in it. From May, 1854, till 1859 I should judge the fences on Clay and Leavenworth streets

remained there. I am not certain as to that. It might have been later. From May, 1854, to 1859, at times, it has been down. About the time the new fence was built it was not in very good condition; up to a short time
before, it had been kept in pretty good condition. A post, rail, and
88 picket fence was put up in 1859 or 1860. Mr. Garthwaite then used
it to turn his cow in. This picket fence was built by Carlton, but Greely worked on it. The rails were got from me to build it with. It was a pretty nice picket fence, made of posts and rails, and pickets of redwood about 4 feet long. A portion of this picket fence remained until within a short time. Last spring most of it was standing or lying down. It was in pretty good condition all the way on Clay street. Up to April last the balance was down. I have had charge of the premises in question for Mr. Carlton in 1857 or 1858, when he moved away. Mr. Greely requested me to take charge of them, two or three years ago, whilst he was in the mines. I had charge of Carlton's house on the lot south of this, and let it to Garthwaite in 1858, who had the privilege of using this lot. Garthwaite used it as a corral for his cow. I can't state how long he so used it. It might have been a year or more.

Plaintiff's counsel then put to said witness the following questions, to wit:

Did you pay any taxes or street assessments upon said lot?

(To which question said defendants objected, on the ground that said
89 question and matter contained therein were incompetent, irrelevant,
and immaterial; but the court overruled said objection for the reason that the acts of paying taxes and street assessments were acts which might, with other acts, go to the jury to show possession, to which ruling said defendants then and there excepted.)

Said witness then answered: I paid the taxes and assessments upon said lot for grading the street for Mr. Greeley I don't recollect the date of the payment of street assessment for grading; I think it was in 1859. Men have been grading on Clay street off and on for the last six or seven months. I think Leavenworth street was graded in front of that fifty-vara lot in 1859 or in 1858. I think it was graded once before that. The last grading on Leavenworth street left the street six or seven feet below the lot. The lot had a sand bank on it, so that the bank fell down and the fence also into the street. Some part of the grade in front of this lot was 7 or 8 feet deep, and from that to 3 or 4 feet. I don't recollect the condition of the fence on Leavenworth street on the first of April last; during last
winter a great part of it was down along that street, and por-
90 tions lay on the bank. I saw persons building a new fence on
Clay street, inside of the old picket fence. Nearly all of the picket fence was up on Clay street at this time. I saw the last witness at work on this new fence. The two fences were a few feet apart. Mr. Carlton's claim to the lot he bought from a Mr. S. B. Conrey.

Cross-exam'd.

On cross-examination said witness testified as follows:

I did not know fifty-vara lot 1188 prior to March, 1854. I do not know that there was a fence prior to that time. I know of no fence when I first saw the lot, except a new picket fence on the south side of the lot, and a picket fence on the west side belonging to Mr. Hayn. The lot was pretty thickly covered with bushes. I did not notice any fence on the lot, except on those two sides. There might have been another fence built in 1854. They were building a fence on the north and east sides of this lot. I used to pass up the little street in the rear of fifty-vara lot, next south of this lot,

and thence directly across this lot to Clay street; I saw no indication of their repairing a fence. I saw no fence there before, but there might possibly have been a fence. I think I passed out somewhere near the
91 corner of Clay and Leavenworth streets; teams did not pass through there. It was only a path through the bushes. The little shanty now stands opposite the back street. It does not join Mr. Garthwaite's building. It comes to the line of the small street. I judge by looking at it that a portion stands on the west half of the fifty-vara lot. I only judge from the eye. I did not measure, and can't say certain. It stood originally on the east half, in about the middle of the east half, on Leavenworth street. I don't know the name of the man that slept in that shanty. I saw a bed in there. He was in Conrey's employ. I don't recollect the exact time the shanty stood there, but I think a year or more. To the best of my judgment it was about a year. I would not be positive that it is now on the west half; I did not measure, but judging from my eye I should think it was. Mr. Garthwaite has a drive way, running in from Leavenworth to his building, some ten or twelve feet off from this very fifty-vara lot to this building. He has a fence on the side of this drive way back to the house. It has been so nearly ever since he bought his place of Carlton. The fence that was built in 1854 was sometime down in places. I don't know that the framework of the fence built in 1854 was the same that pickets of the fence built in
92 1859 were nailed to. Carlton used the lot for a corral for his cow from the time he bought until he went away. The fence on Leavenworth street fell down soon after grading. The fence fell down by reason of the grading; think the grading was in 1859 or later; undertook to grade it twice. A man by the name of Hopkins took the job, and graded some portion. I rented Carlton's house to Garthwaite. I made no use of it myself. I did nothing with the lot 1188 while I had charge of the west half of it from Greely, except to pay the taxes and street assessments for him. About all the picket fence on Clay street remained up.

Chas. A. Spalding, on behalf of pl'ff.

Plaintiff then called, as a witness on his behalf, one Charles A. Spalding, who testified as follows:

I live on Leavenworth street near Clay; have lived there since September, 1854, except that I have been to New York State twice since that time. I know fifty-vara lot number 1188 since November, 1849. The first time that I knew that lot to be fenced on Clay and Leavenworth streets was, I think, in 1854. That is the first fence that I distinctly remember. This fence was composed of posts, and I think two rails—2 by 3. I saw it there between March and September, 1854. There was a picket fence on the west side of lot 1188, previously built by Mr. Hayn, and also a picket fence on the
93 south side next to Carlton's lot. I think Carlton left an opening in the south fence to turn his cow through. I don't remember that Carlton kept his cow there. There was at one time a small house on the lot, near to the line of Leavenworth street, ten or twelve feet back from Leavenworth street, and about midway between the south and north lines of the fifty-vara lot. Carlton put it there for a workshop, and had lumber and window frames in it; it remained there about a year. The fence on Clay, of which I have spoken, most of it remained up for some years, partly broken down. I should think a part of it might have been in 1859. A new picket fence was afterwards put upon Clay and Leavenworth streets; posts 3 by 4, or 4 by 5, and 4 feet pickets. That picket fence on Clay street in March last, and fore part of April, appeared to be most of it standing erect; the portion towards the corner might have been leaning. On the line of

Leavenworth street this picket fence was down. There might have been a joint or two at the ends hanging, but I think it was all down. It laid along the bank in sections. The last grading on Leavenworth—the street on the line of this lot—commenced in September, 1860. They were pretty
94 near a year finishing the street. The grading, I think, made the fence fall down. They graded up to the posts, and the fence fell down in sections. I saw Carlton's son cutting brush and roots there for firewood, in 1854 to 1857, and 1858. I have seen Carlton, his son, and Greely, about this lot at times. I have seen a new fence around this lot put up since last year. On Clay street it stood 2 or 3 feet inside of the old picket fence there. I saw Van Antwerpt at work on it.

Cross-exam'd.

On cross-examination said witness stated as follows:

The first fence on lot 1188 which I remember was in 1854. I went to the States on January 15, 1853, and at that time I was up to see my lot and saw no improvements in that vicinity. When I returned from the States, in November, 1853, I recollect, and so stated, that all the lots in that vicinity were fenced in, but I cannot swear particularly in regard to lot 1188, or in regard to Dr. Hitchcock's lot. All the lots in that vicinity appeared to be enclosed, including my own. I was surprised, as it appeared to me; almost everything—the whole neighborhood—was fenced in. I don't think I have stated that I found this particular lot, 1188, fenced when I returned from the States in the fall of 1853. I stated that it seemed to me that
95 the whole neighborhood was then fenced up. The vicinity includes lot 1188, as it is near my lot. I may have stated, for such was the fact, that the fence which on my return from the States I found around my own lot and the others in the vicinity, was composed of posts, and from one to three boards all around; could not be certain to the exact number of boards, but as good a fence as was generally put around lots at that time, but I don't think that that statement was made particularly in regard to this lot 1188. I think I saw two men working on a fence on this lot in 1854, between March and September, but I can't state in what month, nor on which side of the lot they were working. The small building or workshop of which I spoke in my direct examination was on the east half of this fifty-vara lot near to Leavenworth street, within 12 or 15 feet of it. It remained there somewhere about a year. The fence was on this lot in 1854; was often out of repair, and more or less of it at times was down. I think a length here and there was down. I think the picket fence at the corner stood a few feet on Leavenworth street, at the time they were grading there. I recollect putting up a flag on the Clay street fence, to indicate
96 where the line of Leavenworth street came, when they were grading there.

Festus O'Donnell, on behalf of pl'ff.

Plaintiff then called, as a witness on his behalf, one Festus O'Donnell, who testified as follows:

I know fifty-vara lot 1188. I graded Clay street in front of that lot, from Leavenworth to Hyde street. I received the contract about the first of March last, and did the grading during that month. The fence along this lot on Clay street was then a respectable-looking fence. Before the first of April, 1862, I graded along that fence, and it fell in some, and I proped it up as well as I could. Caleb Burbank paid me for half the grading on the street on that side of the fifty-vara lot and the plaintiff Greely paid me for the other half.

Jos. T. Simmons, on behalf of pl'ff.

Plaintiff then called, as a witness on his behalf, one Joseph T. Simmons, who testified as follows:

I know fifty-vara lot 1188. I was there about the 25th day of March last. The fence on Clay street was then up; on Leavenworth, the fence, a part of it, was up and the rest was lying down on the bank.

Cross-exam'd.

On cross-examination said witness stated:

97 I could not say that any of the fence on Leavenworth street was gone. It was leaning upon the bank; a small portion was lying down.

Henry E. Carlton for plaintiff.

Said plaintiff then called, as a witness, one Henry E. Carlton, who testified as follows:

Know parties. Know the premises in question. In 1853 I lived on Leavenworth street, between Clay and Sacramento, on lot 1187, adjoining this lot. I resided there until February, 1858. The first time I saw the lot in controversy was last of December, 1852, of first of January, 1853. I have known it from that time to the present time. In 1852 and 1853 the lot was in a state of nature, covered with bushes very thick; bushes and small trees, some from two to four inches through, growing very thick. No fences in vicinity at all. The first time I was there, from fall of 1853 to spring of 1854, I was upon it and around it all the time. In December, 1853, I bought on lot 1187; deed made in December, 1853. The same month I fenced the lot adjoining lot in question, with a picket fence. I put on a white-pine picket fence on south line of lot 1188, and on north of 1187. I can't say how often I was on the lot. In December, 1853, I built my house about six feet from the line of this lot in question. I was around lot in

98 question, and saw it all the time nearly. I saw it every five minutes in the day. I was across lot often in winter of 1853 and 1854. I hauled lumber across. I was across the lot in fall of 1852 and 1853. I was frequently across it. I commenced house in December, 1853, and finished it in January, 1854. I used to cross it hauling some lumber that way through a little valley or hollow. I could not get good sand, and took out a length of fence, and got some sand, which was blown up in a bank on the lot of 1188. The first fence was built on the west line, some time in the summer of 1853. It was a post and picket fence on Clay street. The first fence I ever knew or saw on it was in 1854—about middle of May, 1854. I built that fence; it was 3 by 4 posts, scantling on top 2 by 3, and about 18 inches below top rail was another two by three; same kind as on the top. The fence on Clay street extended whole length of the lot, 137½ feet from Hayn's lot, towards Leavenworth. I also built at the same time a fence on Leavenworth street, to connect this fence with my fence; same kind as the one on Clay street. When the fence was built on Clay and Leavenworth streets, the whole lot was enclosed. When these fences were finished, the whole lot was enclosed.

99 The fence was put up the 20th of May, 1854, on these two streets. I know about a building on the lot. The building stood in about the centre of fifty-vara lot, on Leavenworth street, built about 8 or 10 feet from street; 8 by 12 building, two windows, and a door built of scantling and boards, one window in front and one on end—glass windows; door also with lock and key. I did the labor on the house for another man. I furnished the materi-

als and had my hands do the work. I helped. I had it done by another man. I built the fence for him, too; built for Samuel B. Conrey—for Conrey and Mr. Woods. He, Conrey, told me Mr. Woods owned it with him. Mr. Conrey was the one who employed me to do it. After I built it, Mr. Conrey had a man there about six weeks, who occupied it. He slept there. I think he lived there altogether. He had a small stove and bed there. That building remained on that lot somewhere about a year, as near as I can judge. After the man left who slept there, I occupied it myself for a sort of workshop. I had my tools there and worked there. It remained there about a year, till the summer of 1855, when moved it to the southerly part of the lot, about fifty feet from Leavenworth street. I moved it down on
100 southern side of the lot, and connected it with my buildings on the other lot. I then used it as a stable for my cow till February, 1858. It stands there now; it did a few hours ago. It was used from the time I ceased to use it, and afterwards I saw it in occupancy frequently. Mr. Garthwaite used it. He used same as I did, to keep his cow and horse in. I leased it to him. I leased my lot to him, together with this lot, and gave him the privilege to use it and take care of it, and make such changes as he chose. He did make some changes, and connected other buildings. It was about a month or three weeks after I left it before he went in. I came over and found some one had taken away the doorsteps, and had been in the house, and I leased it to Garthwaite, and desired him to take care of it. Left the keys with Mr. Loring.

Mr. Conrey had care of the lot for a month, or a month and a half, about six weeks after it was built. Then he came to me and wanted me to take the keys. He put the lot in my care and gave me the key, and told me to use it as I would my own; to keep the fences up and take care of it. I occupied the house and used it for a workshop, for short work—window sash, &c. It was not long enough for long work. Had lumber piled on the lot.
101 No other uses during that summer. I had care of it for Conrey till about February, 1855, when I bought of Conrey. I think it was in February, 1855. It was soon after smash-up of Adams & Co. The same fence was there which I built from time I built it to February, 1855. It was all there, not broken down or altered—a good fence, same as it was when I built it. From February, 1855, till after I bought, it was used by me. At the time I bought from Kimball street up to Leavenworth street there was a picket fence between 1188 and 1187, which I had originally built. When I bought 1188 I took this fence between the lots down and used the two lots in common. I bought me a cow and used this little building for a stable for my cow as soon as I bought, and while the building stood where it was originally built I kept the cow in this building till along in the summer; then I moved the building down near my house and connected it with my other buildings. Cow used to pasture on this lot and the rear of my house on the other lot. She ran on this lot, and I used it all the time till I went away in 1858. In the daytime she was on the lot; at night in the stable. I had some ten or twelve thousand feet of lumber piled on the lot; I used it while here, and left a portion of it upon the lot; worked
102 some of it upon the lot. Some of it remained on the lot till since the street was graded. I probably graded some in the lot, and intended to grade more; had the roots dug up so that the wind would drift the sand down into the lower ground, and with that intention. It was thickly covered with bushes in 1853 and 1854; some of the willows as thick as anywhere about there—a good deal of wood. I cut it off and used it for firewood. I began to get wood there for firewood, and continued to get wood there till I left. What there was left, took it out roots and all. More on upper than lower part. I cut wood off, had roots dug and

ready for grading, and occupied same as the other lot. At time I leased to Garthwaite, in 1858, there was not much left. Some little on Greely's part. There was but little wood on it; was about same as it is now. After I took the fence away there was a considerable sand against this fence. This I cut down—all the grading I did. I sold to Greely a part of the fifty-vara lot.

Defendants moved to strike out last time. Motion denied. Defendants except. Witness stated before motion that the conveyance was in writing.

Question. What time did you sell to Greely? Objections by defendants; sustained, and exception.

103 Question. What part of the fifty-vara lot did you sell to Greely? Objections by defendants; sustained, and exception.

I had care of this lot in controversy in 1854, and I had care of it in 1856, '57, and '58. In 1859 Mr. Loring had care of it, and Mr. Greely himself a portion of 1859. In 1860 Mr. Garthwaite had care of it; in 1861 Mr. G.—same man—had care of it. He had it still last spring. Some time from 1855 I had the care of it for Greely; I kept the fence up, took care of it, paid the taxes for Mr. Greely while he was away in the mountains, from 1855 to February, 1858, when I went away. From 1855 to 1858, while I took care of it for Greely, I occupied the same as I did my own, and put it to the same use. I paid the taxes yearly as they became due, from 1855 to 1858—from the time he bought; I think it was in 1855. I did not pay the street assessments for grading. After I ceased to have care of it Mr. Garthwaite occupied it; I left it to him. Mr. Loring had care of it for a fortnight or three weeks; then I took charge again till Greely returned. In 1859 Mr. Greely built a new fence along the line of the two streets; Mr. G. and I built it together. It was in the spring of 1859; I can't remember the month—some time in

104 March or April. I think it was a picket fence—four-foot pickets, posts, and rails, 2 by 3, and pickets nailed on. The posts were all new, pickets all new, rails, with exception of three or four, that was sound, and nails all new. A portion of the fence stood there till the last of last month, about. In front of Greely's lot it all stood perfect till three or four weeks ago. On Clay street from time I built it up to the last April, it was good. On the second day of last April it was all good, except the first joint was sprung out about two feet; I put a prop up against it; with that exception it was good down to Hayn's lot; were at the time grading on Clay street, down to Hayn's lot, when I was there on that day; Leavenworth street along this lot I was then grading. I don't remember the exact time; I think it was in 1861. About a year ago last August I paid the last assessment for grading. The grade along this lot on Leavenworth, near my house, about ten feet, near corner of Clay street, about six feet. I don't know grade of that street only from bank at line of lot. It fell off rapidly; should think average about six feet. The condition of fence near Leavenworth street was good—a perfect fence as when it was built; at time commenced grading

105 on Leavenworth street the grading caused the fence to come down by degrees. The surface was sand; sand would slide down and left the posts in sections hanging out of ground till it gradually came down. In March, about middle, the fence a portion of it had fell down; some had slid down endways towards street; some fell otherwise on bank, except panels at the end, which stood. I picked up the panels and laid them together in sections on the bank; this was about two weeks before the squatting. This was last time I saw it before first of April; I next saw it the second day of April. On that day the fence on Clay street from Hayn's up to corner of Clay, all up except sixteen feet; the first joint open, as I stated before, and I propped it up. On Leavenworth street the first joint was there; in one place one small panel was shoved over another so as to make it double, and one panel had been slipped away to let a building be moved, and the

rest all lay along there, not exactly as I left it when laid on the bank, but some had slid down and laid against the bank. On that day I saw two buildings on the lot: one old building recently moved there, with blockings under it as though just moved on; the other the building I had built on it, the lot, as before stated. Two men at work there where house recently moved on was. I was there April 4th, and there seemed to be a new
106 fence built inside the other fence along Clay street, except a gap in one place where fence did not join. At corner of Clay new fence seven feet inside of picket fence; at Hayn's 3½ feet inside. On 4th of April all the fence that I and Greely built was there in good condition as when I saw it on second, and a new fence inside, both standing side by side. On Leavenworth street on April 4th, a new fence built about sixty or seventy from Garthwaite's, continued up towards the corner some seventy or eighty; then an open space about thirty, then a new fence again continued on to corner new fence inside of line of old fence, and the old picket fence was tumbled out into the street; did not count the number of lengths; did not count them, and should think the whole of it lay tumbled about into street; don't know who tumbled into street. Two men at work there; said names was Clark, but said not brothers; I never made any sale of the house. I first built on these premises to Garthwaite. There was no fence on the line of lot 1188 on Clay or Leavenworth street from December, 1853, to May, 1854; could not have been on there and I not see it, unless built in night and taken away in night. No fence or any sign of fence there from the time I first knew it till I
107 built the fence there in 1854.

Cross-examination.

I have a suit pending in this court for a part of this fifty-vara lot against Townsend *et al.*—the part in Leavenworth street, south side. It joins a lot I originally owned in this lot and sold. It comes within ten feet of Garthwaite's line, 25 by 68 9-12. There is a fence ten feet on that line, Garthwaite put up on. I can't tell how long that fence has been there; he has moved it back and forth; I think put there since he built his house. It extends back to the north line of the little shop. It has a passage in and out to his buildings there; the front edge of the shop, I should think, about 50 feet from Leavenworth street—40 or 50. I think house 10 by 12, some 50 feet to shop, and that extends some 10 or 12 feet further, making some sixty feet, more or less, from street to back of the house. Mr. Garthwaite has had possession of this alley-way and this shop ever since he leased it from me. I don't know whether he occupies the shop now or not. He has been making some alterations; he graded this off, I think, since grading of street. He wanted to put a swing for his children, and I told him he might do so, and he graded off as much as suited his purpose. I sold him a certain lot, part of
108 1187, describing it and all appurtenances thereunto belonging, nothing more, nothing less. Mr. Garthwaite may occupy the shop now, but don't know. He has been making some improvements. When I let him have it I told him he could have till I wanted to use it. I bought the fraction of 1187 in December, 1853; the deed was made in December, 1853, but the bargain was made some five or six months before, but deed not made till December, 1853 I commenced building my house in December, 1853. I never saw any fence at any time, or part of a fence, on lot 1188, on streets till I put my house on it in May, 1854. I built my fence on south side in December, 1850, and Hayn's on west, and none on either of the other sides that I ever saw. If any fence had been there from August, 1853, to May, 1854, unless built and removed in night, I think I should have seen it. I was there from August to December, 1853. I was there once a week

or two weeks from December; I was there building my house and fence daily, and while I was there this lot 1188 was immediately under my eye. From time I commenced building my house till I finished it for Conney, I was not away from the premises an hour at a time perhaps—I was not away. I did not go to town for provisions and
109 so forth. Greely used to go for me. I have known Greely 20 years, I suppose; not a relation of mine or of my wife's. He worked for me in the States in summer from August, 1853, to December. I was there every week or once a fortnight; don't think a fortnight elapsed; and I did not see any fence till I built the fence, and I knew there was none there then. I never saw any. I won't swear that there might not be a fence there, because there might have been one and taken away and I not seen it. But I don't think there could have been one there without my seeing, because I crossed it frequently during that time, once a week or fortnight, and I never saw any particle of fence, or signs of any. Don't remember now where I got the lumber. About May, 1854. I did not build a house for Jasper Smith. I built a house for Mrs. Mary Smith. Don't know whether she was his wife or not. He called her Mrs. Smith. Don't know whether he claimed her for his wife or not. I made the contract with Mrs. Smith. A man by the name of Smith around there at the time. A fence around the Smith lot; it was taken down by some of the men I employed; I did not take that lumber up and make a fence of it on lot 1188.
110 I built that all of new lumber. Fence built before house. Mr. Smith never spoke to me about taking this lumber. The fence around Mrs. Smith's lot not built until after her house was completed; the last thing done. After house done Mr. Smith wanted me to build some lattice-work. Mrs. Smith had told me not to mind what Smith said. I asked her; she told me not to build it. Smith got some of my men to build it, and they used this old lumber for bracing. I never used any of this lumber to build the fence on lot 1188, and he never spoke to me about it. I hauled the lumber to the valley beyond same to build Mr. Smith's house. I hauled the lumber across 1188 before I built the fence around it. After I completed my house I was there all the time every day till my family came, and for a month or six weeks after my family arrived. This was the first job I got, except I worked on Loring's house on the adjoining lot. The house I built for Conrey was on the 23d of May, 1854. Fence and house built from 20th to 23d of May. I know it from charges on my books. I charged it to Conrey alone. I knew no one but him. He spoke to me about it. He told me there was another man interested with him. I sold part of this lot to Burbank. I heard that there was a suit commenced. I sold to him a part of the lot. I heard him say he had bought an ejectment suit. I put up
111 the fence on the south side from Kimball street to Leavenworth. Sam. Randall built the other from Kimball street. We bought our lumber together, and whole built at the same time. Greely generally comes to my house when he comes down from the mountains. Only comes once in 2 or 3 years. In building the new house stopping up Kimball street, used a few strips of the old fence. The whole of the little house, since it moved, stands on east half of lot 1188. Stands there now; one end been taken out. Some grading on Leavenworth street. I have forgotten the man who took the contract. Mathewson, and Whitcomb, and myself, agreed to have it cut 22 feet wide. Name not Hodgkins; can't remember his name; I think I should remember if I heard it I am not certain. Hodgkins got the job afterwards. Did some grading in 1858 some time, I think. He did not apply to me to sign for grading Leavenworth street or to pay for it. I did not pay him, nor would not pay him or any other man, till got contract completed. Did not pay him for grading my lot. Don't

think I signed the contract for grading with the contractor. Don't remember that I signed. Don't think I did. I may have done so, but don't think I did. The first man drew up a contract. I don't I signed it.
112 He afterwards sold it to Hodgkins. I don't remember that Hodgkins applied to me to sign the contract that I recollect of, or for payment.

Question by defendants.

Did you assign as a reason for not subscribing or paying that you did not own it?

Answer. No; I never did tell him so, nor on the ground that the fund commissioners owned and I did not. Don't remember James A. Parker, a carpenter in 1853. I may know him by sight, but I don't by name. I did not say Mr. Conrey paid me for taking up this lot, but I say now he did pay me. I carried in my bill; he paid me all the charges I had against him. This fence, from 1854 to 1859, was composed of posts and two strips. The fence was not at all times same height. The fence itself was not lower, but the wind blew up the sand so that it was not so high above the ground; when built, about three feet. I fed the cow while she ran on the lot. There was some little grass in spots, and green bushes in spring. I turned her in to browse, not so much for the feed, but was some feed there.
113 I fed her all the time. I had lumber piled on the lot, down on Greely's lot, down in rear of little building. It was there, some of it, till last spring. At this time all gone but three whole pine planks, eastern lumber. They had been there since 1855. What I left I piled up against fence when I left. All had been taken away except those three planks. I took it home last spring; the 10,000 feet. I used it up from time to time as I wanted it, at different times. It was all gone from this place, except the three planks, before I sold to Garthwaite. I can't tell how much grading. I did not do any except for my own convenience; I dug out the roots for wood, and so I could grade it when I got ready to put up his building. Wheeled the sand I mentioned down on to Greely's lot.

Question. Did Mr. Conrey request you to return him a part of this lot, subsequent to 1855, on the ground you kept it for him?

Answer. No, sir. Did not know he took the benefit of the insolvent laws.

Plaintiff then offered to give in evidence to the jury a certain deed, dated February 25th, 1854, purporting to be from one S. B. Conrey to one F. H. Woods, which deed is in the words and figures following, to wit:

114 *Deed from S. B. Conrey to F. H. Woods, Feb'y* 25, 1854.

This indenture, made the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and fifty-four, between Samuel B. Conrey, of the city of San Francisco, State of California, of the first part, and Frank H. Woods, of the same place, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the surrendering and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all my right, title, and interest in that certain piece or parcel of land, being the one half of the fifty-vara lot known on the official map as number eleven hundred and eighty-eight, commencing on Clay street twenty-five varas west from Leavenworth street, thence along Clay street west twenty-five varas; thence south, parallel with Leavenworth

street, fifty varas; thence east twenty-five varas; thence north fifty varas to the place of beginning, together with all and singular the tene-
115 ments, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interests, property, possession, claim, and demand, whatsoever, as well in law as in equity, of the party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and his assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

S. B. CONREY. [L. S.]

Signed, sealed, and delivered in presence of—
JOS. W. FINLEY.

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this twenty-fifth day of July, A. D. one thousand eight hundred and fifty-four, before me, a notary public in and for said county, personally appeared Samuel B. Conrey, known to me to be the individual de-
116 scribed in and who executed the foregoing conveyances, and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed
[L. S.] my official seal, in the county aforesaid, the day and year first above written.

JOS. W. FINLEY, *Notary Public.*

Recorded in the county recorder's office, San Francisco, in Lib. 43 of Deeds, page 365, August 11, 1854, at 10½ a. m.

JAMES GRANT, *County Recorder.*

The defendants objected to the admission of said deed in evidence, on the ground that no title to the property therein described had been shown in said S. B. Conrey.

The court overruled said objection, to which ruling the defendants then and there excepted. Said deed was then read in evidence to the jury.

Plaintiff then offered to give in evidence to the jury a certain other deed, dated January 2, 1855, purporting to be from F. H. Woods to S. B. Conrey, which said deed is in the words and figures following, to wit:

Deed from F. H. Woods to S. B. Conrey, Jan'y 2, 1855.

117 This indenture, made the second day of January, in the year of our Lord one thousand eight hundred and fifty-five, between F. H. Woods, of the city of San Francisco, State of California, of the first part, and Samuel B. Conrey, of the same place, of the second part, witnesses, that the said party of the first part, for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns

forever, all my right, title, and interest in that certain piece of or parcel of land, being the one half of the fifty-vara known on the official map as number eleven hundred and eighty-eight, (1188,) commencing on Clay street, twenty five varas west from Leavenworth street; thence along Clay street, west twenty-five varas; then south, parallel with Leavenworth street, fifty varas; thence east twenty-five varas; thence north fifty varas to the place of beginning, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, re-
118 mainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and his assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

F. H. WOODS. [L. S.]

Signed and delivered in the presence of—
E. V. JOICE.

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this third day of January, A. D. one thousand eight hundred and fifty-five, before me, a notary public in and for said county, personally appeared F. H. Woods, known to me to be the individual described in and who executed the foregoing conveyance, and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein men-
119 tioned.

In witness whereof, I have hereunto set my hand and affixed my
[SEAL.] official seal, in the county aforesaid, the day and year first above written.

E. V. JOICE, *Notary Public.*

Recorded in the county recorder's office, San Francisco, in Liber 50 of Deeds, page 358, January 30, 1855, at $2\frac{3}{4}$ p. m.

JAMES GRANT, *County Recorder.*

The defendant objected to the admission of said deed in evidence, on the ground that no title to the property therein described had been shown by said F. H. Woods; but the court overruled said objection, to which ruling said defendants then and there excepted.

Said deed was then read in evidence to the jury.

Said plaintiff then offered to give in evidence to the jury a certain other deed, dated February 24, 1855, purporting to be from S. B. Conrey to Hepsebeth Carlton, which deed is in the words and figures following, to wit:

Deed from S. B. Conrey to Hepsebeth Carlton, Feb. 24, 1855.

This indenture, made the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and fifty-five, between Samuel B. Conrey, of the city of San Francisco, State of California, of the first
120 part, and Hepsebeth Carlton, of the same place, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States

of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all my right, title, and interest in the following parcels of land, to wit: Commencing on Clay street, twenty-five varas from the corner of Leavenworth street; thence westerly along Clay street, twenty-five varas; thence southerly fifty varas; thence easterly twenty-five varas; thence northerly fifty varas to the place of beginning, being the westerly half of a fifty-vara lot, number 1188; also commencing on Fifth street, southerly from the corner of Bryant street, fifty varas; thence southerly along Fifth street, fifty varas; thence easterly fifty varas; thence northerly fifty varas; thence westerly fifty varas to the place of beginning, being part of the one hundred vara lot number 185, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and assigns forever.

121

In witness whereof, the said party of the first part hath hereunto set his hand and seal on the day and year first above written.

S. B. CONREY. [L. S.]

Signed and delivered in the presence of— the word "along" being first erased—

Jos. W. FINLEY.

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this twenty-fourth day of February, A. D. 1855, before me, Jos. W. Finley, a notary public, duly appointed and commissioned under the great seal of the State of California, authorized by law to take acknowledgments, dwelling in the city of San Francisco, county aforesaid, came S. B. Conrey, to me personally known to be the individual described in and who executed the within instrument, and acknowledged that he executed the same for the purposes therein mentioned of his own free act and deed.

122

[L. S.] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

JOS. W. FINLEY, *Notary Public.*

Recorded in the county recorder's office, San Francisco, in Liber 51 of Deeds, page 297, February 26th, 1855, at 4½ p. m.

JAMES GRANT, *County Recorder.*

The defendants objected to the admission of said deed in evidence, on the ground that no title to the property therein described had been shown in S. B. Conrey; but the court overruled said objection, to which ruling said defendants then and there excepted, and said deed was therefore read in evidence to the jury.

Said plaintiff then offered to give in evidence a certain other deed, dated

July 7th, 1856, purporting to be from Henry E. Carlton to George G.
123 Greely, which deed is in the words and figures following, to wit:

Deed from Henry E. Carlton to George G. Greely, July 7, 1856.

This indenture, made the seventh day of July, in the year of our Lord one thousand eight hundred and fifty-six, between Henry E. Carlton, of the city of San Francisco, State of California, of the first part, and George G. Greely, of the same place, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of fifty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land in the fifty-vara numbered eleven hundred and eighty-eight, (1188,) to wit: Commencing sixty-eight feet and nine inches from the corner of Clay and Leavenworth streets; thence along Clay street sixty-eight feet and nine inches; thence southerly one hundred and thirty-seven feet and six inches; thence easterly sixty-eight feet and nine inches; thence northerly one hundred and thirty-seven feet and six inches, to the first-mentioned bounds; together with all and singular the tene-
124 ments, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and his assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

H. E. CARLTON. [L. S.]

Signed, sealed, and delivered, in the presence of.

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this seventh day of July, A. D. one thousand eight hundred and fifty-six, before me, a notary public in and for said county, personally appeared Henry E. Carlton, personally known to me to be the individual de-
125 scribed in and who executed the foregoing conveyance, and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my [L. S.] official seal, in the county aforesaid, the day and year first above written.

CHARLES HALSEY, *Notary Public.*

Recorded in the office of the county recorder of San Francisco County, July 7th, 1856, at 2½ p. m., in Liber 63 of Deeds, page 178.

F. D. KOHLER, *County Recorder.*

The defendants objected to the admission of said deed in evidence, on the grounds that said deed did not appear to have been sealed by the grantor therein; that no title to the property therein described had been shown in

Hepsebeth Carlton, the grantor therein mentioned, nor any connection shown between the said Henry E. Carlton and Hepsebeth Carlton, mentioned in the deed previously given in evidence. The plaintiff then offered Henry E. Carlton as a witness, who testified:

Henry E. Carlton, for plaintiff.

"I have a wife by the name of Hepsebeth Carlton. She has been
126 my wife for 25 years. S. B. Conrey sold her the property described in the deed."

The deed, in the place where the seal is usually placed, had a scroll formed with a pen and ink with the letters L S enclosed therein in the form following, [L. S.] The court held this to be a seal, and admitted the deed in evidence, and thereupon the objections were overruled, and the defendants excepted, and the deed was read to the jury.

This was all the evidence given in chief on the part of said plaintiff, who thereupon rested the case.

TESTIMONY FOR DEFENDANTS.

Mr. McHenry, counsel for the defendants, thereupon moved the court to strike out all the deeds given in evidence by the plaintiff, on the ground that it has not been shown that the title to the lot in dispute has ever passed out of the government, and that the court cannot take notice of anything as a proper title to lands unless it is derived from the government; but the court overruled said motion, to which ruling said defendants then and there excepted.

Said counsel for the defendants then moved the court to non-suit said plaintiff as to both of said defendants on the ground that the entry of
127 the defendant Powelson on the premises in question, on the 1st day of April, 1862, did not remove any possession of the plaintiff on that day, nor he thereby a trespasser upon any possession of the plaintiff; that said plaintiff, upon the evidence given, was not then in the actual possession of said premises, and that no paper title to said premises having been shown in him at that time, there could be no constructive possession thereof by him; but the court denied said motion, to which ruling said defendants then and there excepted.

Said counsel then moved the court to non-suit said plaintiff as to said defendant Townsend, on the grounds:

1st. That the evidence does not show any entry upon said premises by the said Townsend.

2nd. That said evidence does not show that said Townsend was in possession of said premises, or of any part thereof, at the time of its commencement of this action.

The court denied said motion, to which ruling said defendants then and there excepted.

Said defendants then opened their case to the jury, and stated to the jury that they expected to prove a prior possession of said fifty-vara lot by one
128 James W. Parker; that said lot was fenced and possession thereof taken, in August, 1853, by the said Parker, who had claimed it ever since until he conveyed his right thereof to one James E. Munford; and intended further to show a title to the premises in the said James E. Munford, derived from the United States through the city of San Francisco; and further to show that the lot was vacant and unoccupied at the time possession thereof was taken by the defendant Powelson, and that the said Powelson was justified in peaceably taking possession thereof under a lease of said lot from the said Munford to him, giving him the right of possession,

and the *the* defendant Townsend was justified in all acts done by him in reference to said lot under and by virtue of a power of attorney from said Munford to him, then in force, and authorizing said acts, and thereupon called as a witness on their behalf one Andrew Williams, who, having been sworn, testified as follows:

Andrew Williams on behalf of defendants.

I reside in the city of San Francisco. I have been in business and have had an office here since 1850. I know James W. Parker. He lived in this city in 1853; he was in some way connected in business with Mr. Hutton, the auctioneer; he was a cousin of mine by the mother's side. I know fifty-vara lot number 1188, situated on the southwest corner of Clay and
129 Leavenworth streets, in the city of San Francisco. Some time in the summer of 1853, James W. Parker had a fence built on two sides of that lot—on the Leavenworth street side on the east, and on the Clay street side on the north. I had owned a lot out near the lagoon, and had transferred it to a Mr. Hart. Mr. Parker and Mr. Hart agreed to fence these two lots together. They took up a quantity of lumber, and left a part of it on this lot number 1188, and took the balance to Hart's lot near the lagoon, and they two, with a Mr. Vogel, the teamster, and myself, put up the fences on both lots. We put up a fence on the two sides of this lot 1188; that is, on the side next to Leavenworth street, and on that next to Clay street. There were fences already at that time on the two other sides. This Mr. Vogel was the person from whom Parker purchased this lot. I don't know the teamster's name, nor whether he is now in this city or not; I don't know that I should know him if I were to see him I think Mr. Vogel is not now in this city; I have not seen him for a good many years. Mr. Parker received a deed from Mr. Vogel for this lot 1188.

Thereupon said witness was shown a deed, dated July 14th, 1853, purporting to be from Charles Vogel to James W. Parker, for fifty-vara lot number 1188, and other property, and says:

130 This is the deed by which said Vogel conveyed said lot to said Parker.

Thereupon said defendants offered and read said deed in evidence to the jury, and it is in the words and figures to wit:

Deed from Chas. Vogel to James W. Parker, July 14, 1853.

This indenture, made the fourteenth day of July, in the year of our Lord one thousand eight hundred and fifty-three, between Charles Vogel, of the city of San Francisco, party of the first part, and James W. Parker, of said city, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of four thousand seven hundred and fifty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath remised, released, and quitclaimed, and by these presents doth remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all the right, title, and interest of the said party of the first part of, in, and to those two fifty-vara lots lying in the city of San Francisco, and on the city map, and known and distinguished by the numbers nine hundred and sixty-eight, and nine hundred and sixty-seven, (Nos. 968 and 967,) bounded northerly by Geary street, westerly by Mason street, south-
131 erly by O'Farrell street, and easterly by fifty-vara lots numbers 952 and 953, and also all his right, title, and interest and possession of, in, and to fifty-vara lot number eleven hundred and eighty-eight, (1188,) sit-

uated and being the southwest corner of Clay and Leavenworth streets, in said city of San Francisco, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

C. VOGEL. [L. S.]

132 Sealed and delivered in the presence of—
EDW'D D. KUIGH.
A. WILLIAMS.

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

On this fourteenth day of July, A. D. 1853, before me, Gilbert A. Grant, a notary public in and for said county of San Francisco, personally appeared Charles Vogel, known to me to be the person described in and who executed the annexed instrument, and who acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto affixed my official seal, and subscribed my name, the day and year first above written.

[SEAL.]

GILBERT A. GRANT, *Notary Public.*

Recorded in the office of the county recorder of the city and county of San Francisco, February twenty-sixth, 1862, at forty-six minutes past twelve o'clock m., in Liber 148 of Deeds, page 497.

F. YOUNG, *County Recorder.*

133 It was soon after the date of this deed that we went up and fenced the lots; I think it was in August, 1853. At that time there was no fence on said lot 1188, except one on the south and west sides, made by the owners of the adjoining lots. The fence which we put upon the two other sides was made of sawed posts, driven in the ground, a cap on the top of the posts, and a board on the side, two or three inches wider than the piece on the top. The posts were sawed joist, either three inches by four, or two by three, hard pine lumber. An adze was taken along, with which the ends of the posts were sharpened, and they were driven down into the ground. I saw this fence put up myself; I was there whilst it was done. The scantling on the top was similar to that on the side. That on the side may have been an inch wider than the one on the top; my recollection is that it was an inch wider. The fence was sufficient to turn cattle; the fence was about 4 feet high; its heighth may have varied a little in different parts, as some of the posts were driven in a little deeper than others. I saw the fence completed on those two sides; when so completed, it, with the fences on the south and west sides, enclosed the lot. We enclosed some gaps in the fence on the south and west sides. The fence was made perfect. The lot on the west side of 1188 was enclosed when we went there. There was some
134 lumber left after the fence was completed. This lumber was piled on the inside of the lot on Leavenworth street. I know that that fence remained there a considerable after we put it up. I saw it afterwards; I

saw the same, or one like it, on this lot the next year; that is, in 1854. I saw this fence which we built some time after we built it. In 1854 I saw on this lot said fence, or one similar to it, but it seems to me that another kind of board had been put on it in places; it looked as if it had been mended. I recollect seeing the same fence there for two years or more after we had put it up. I saw posts and portions of said fence there much later. I recollect that I pointed it out to Mr. Whitcomb, to whom I tried to sell the lot. Mr. Parker left here in the spring of 1854, in April, I think, and gave me a power of attorney, authorizing me to take care of and sell this lot. I have tried to sell it to Whitcomb and others. I have not that original power of attorney in my possession. I have lost the original, but it had been previously recorded. I have made a diligent and thorough search for the original amongst my papers, and in every place I could think of, and have been unable to find it. I searched for it at the defendant Townsend's
135 request, and I had searched for it before for another purpose.

Whereupon a paper was shown the witness who said: "This paper is a certified copy of the record of that power of attorney." Said defendants then offered and read in evidence to the jury said certified copy, and it is in the words and figures following, to wit:

Cert. copy of power of attorney from James W. Parker to Andrew Williams.

James W. Parker to Andrew Williams.

Know all men by these presents that I, James W. Parker, at present in San Francisco, being about to return to my home in the State of New York, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Andrew Williams, of said city of San Francisco, my true and lawful attorney for me, and in my name, place, and stead to take the charge of, manage, control, and possess for me a certain piece or parcel of land situated in the county of San Francisco, on and near Broadway, Pacific, Vallejo, Lagoon, and Phelps street, and which was conveyed to said Parker by deed from Wm. Rabe, Dec. 1st, 1853, which deed is recorded in Book 33 of Deeds, p. 464, in the office of the county recorder of San Francisco County; also fifty-vara lot No. 952, on Geary street, between Powel and
136 Mason sts., conveyed to me by J. F. Atwill by deed dated 3d of Sept., 1853, recorded in Lib. 35, p. 256; and 50 vara lot 1188, cor. Clay and Leavenworth sts., to let, lease, mortgage, sell, or otherwise dispose of any part or all of said lands; to institute and defend all suits and actions at law or in equity in relation thereto; to make, sign, seal, execute, acknowledge, and deliver any and all deeds, instruments in relation thereto; to manage, settle, or compromise any suits in relation to said lands, and any other land I own within the State of California; to sue for, demand, collect, recover, and receive for me any and all monies and other demands due or owing to me, or to compromise and settle the same in his discretion; and especially to prosecute to final judgment and execution, and receipt of money on a certain suit in my favor as pl'ff against Roland Gelston as def't, now pending in the supreme court of the city of San Francisco, in which a verdict has been rendered in my favor for $685 dam's, or thereabouts, or in his discretion to compromise, settle, and discharge same; and to purchase, lease, or sell any and all lands for me, but without incurring debts against me except therefor, and to institute and defend all suits and actions for me relating to said lands or otherwise, giving and granting unto my said attorney full
137 power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby rat-

ifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof, I have hereunto set my hand and seal the
[SEAL.] 28th day of April, in the year one thousand eight hundred and fifty-four.

JAMES W. PARKER.

Sealed and delivered in presence of—
H. McCORMICK.
C. GARVEY.

STATE OF CALIFORNIA,
County of San Francisco:

On this 9th day of May, A. D. 1854, personally appeared before me Christopher Garvey, who is personally known to me to be the person whose name is subscribed to the annexed instrument as witness thereto, who, after being by me duly sworn, says that James W. Parker, whose name is sub-
138 scribed to the said instrument as a party thereto, is the person who executed the same, and declared that he executed the same freely and voluntarily for the uses and purposes therein mentioned, and that thereupon the said Christopher Garvey subscribed his name to the said instrument as a witness thereof.

Witness my hand and seal the day and year last above written.
[SEAL.] GILBERT A. GRANT, *Notary Public.*

A true copy of original record at request of A. Williams, October 9th, 1854, at 9¾ a. m.

JAMES GRANT, *County Recorder.*

I, G. W. Beckle, county recorder of the city and county of San Francisco, do hereby certify that the foregoing is a full, true, and correct copy of an original record now in my office, as will appear by reference to Liber 4, Powers of Attorney, page 595.

Witness my hand and official seal this 1st day of June, A. D. 1859.
[SEAL.] G. W. BECKLE, *County Recorder.*

139 Said witness then continued.

I have no doubt the fence I saw afterwards was the same that we put up. I saw it there for, I think, two years after we built it. I think somebody mended it the next year after we put it up. How long precisely after that it remained there I cannot say. The fence which we put there remained there in the same condition until the next year, and then appeared to have been mended. I believe it remained there a year or two after. I tried to sell fifty-vara lot number 1188, for James W. Parker, from about the time he bought it in 1853 down to the time when I did sell it. I tried to sell it very often from 1853 down. I tried to sell it to Caleb Burbank, the present plaintiff's attorney, about a year ago, or perhaps a little less. I finally sold it to a Mr. Munford, who purchased it through Mr Townsend as his agent.

Whereupon witness is shown a deed dated February 25th, 1862, purporting to be from saidJames W. Parker, by A. Williams, his attorney in fact, to James E. Munford, and says: "This is the deed by which I conveyed said lot."

Said defendants then offered and read said deed in evidence to the jury, and it is in the words and figures following, to wit:

Deed from James W. Parker, by A. Williams, his attorney, to James E. Munford, Feb. 25, 1862.

140 This indenture, made the twenty-fifth day of February, in the year of

our Lord one thousand eight hundred and sixty-two, between James W. Parker, late of California, party of the first part, and James E. Munford, of the county of St. Louis, State of Missouri, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred dollars, ($200,) lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, conveyed and confirmed, and by these presents doth grant, bargain, and sell, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land situated, lying, and being in the city and county of San Francisco, and State of California, and known and distinguished on the official map of said city of San Francisco as fifty-vara lot number eleven hundred and eighty-eight, situated at, and constituting the southwest corner of, Clay and Leavenworth streets, in said city and county of San Francisco, together with all and singular the tene-
141 ements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first hath hereunto set his hand and seal the day and year first above written.

JAMES W. PARKER. [L. S.]
By his attorney in fact, A. WILLIAMS.

Signed, sealed, and delivered in presence of—
E. P. PECKHAM.

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

On this twenty-fifth day of February, A. D. one thousand eight hundred and sixty-two, before me, E. P. Peckham, a notary public in and for
142 said city and county, personally appeared A. Williams, personally known to me to be the person described in and who executed by power of attorney the annexed instrument as the attorney in fact of James W. Parker, named in the annexed instrument as a party thereto, and therein described as the party executing the same by his said attorney, and the said A. Williams acknowledged to me that he executed the same freely and voluntarily as and for the act and deed of the said James W. Parker, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my
[L. S.] official seal the day and year in this certificate first above written.
E. P. PECKHAM, *Notary Public.*

Recorded in the office of the county recorder of the city and county of San Francisco February twenty-sixth, 1862, at fifty-one minutes past twelve o'clock m., in Lib. 158 of Deeds, page 499.

J. YOUNG, *County Recorder.*

Witness then continued:

The only definite knowledge I ever had of any persons claiming
143 this lot adversely to James W. Parker, I got about the time I tried to sell it to Mr. Burbank, though about a year or two after I got my power

of attorney from Parker I thought that the fence appeared to have been repaired, and on enquiries was told that some one professed to have a tax title to the lot, but I never saw any person on the lot, living upon it, nor exercising any control over it, nor having any house upon it up to the time I sold it.

Cross-examination of Andrew Williams.

On cross-examination said witness testified as follows:

In August, or about August, 1853, I and others went with lumber to the lot. The lumber came from a lumber-yard. Parker and Hart paid for it. I don't know where it came from. It was either a large load or two loads; I can't say how much; enough to build that fence and the other. I don't know if it was a half a thousand or not; I think more; I think between 600 and 1,000. My impression about 700 feet; that is the best of my recollection. About the same amount was left at the other lot. We fenced two sides of that lot also. We took not quite half of that lot. The lumber was some kind of pine. I think pine or redwood; can't say which. Some of it was joist, either 2 by 3 or 3 by 4. We cut the posts in two in the middle and sharpened the ends. I think the joists were twelve feet long.
144 We drove the posts down about two feet. We built a fence on the south side of Clay street. I don't know now the line of Clay street. I don't think the street was so much covered with bushes as the lot. Clay street was travelled by men, cattle, and horses, &c., but not by carriages. We ascertained the line by the line of other fences, by fence on 50-vara below, and on Sacramento street by other fences. We were most of Saturday building those fences. My recollection of its being on Saturday is from a memorandum made in 1853, nine years and two or three months ago. I recollect from memorandum that it was built on Saturday. I never restored to the memorandum for that purpose. I hunted up the memorandum to ascertain the day and the year when the fence was built. I made the memorandum at the time, and it is signed by the parties. I was subpœnaed to appear here as a witness, and I hunted it up. I did not have any interest in this lot. I never had any interest. Parker left very soon after the date of the power of attorney. Parker went into the army. He may be living and may be dead. After we had built it a week or two, I went up to see the fences. Parker wanted me to sell it. I went up to see it in one or two weeks after. I went to see it again a month or two after. I don't
145 think I went up as late as December, 1853. I went up during the same fall. I don't know that I went up in September. I can't remember the month. In one or two weeks after we built it I went up and saw it then all complete. A month or two after I went up again. I can't say whether it was in September, October, or November. I think it was not as late as December. I went again in the summer of 1854, June or July. I don't recollect of seeing it from December, 1853, to June or July, 1854. I don't know that any fence was on the lot in December, 1853, in March, 1854, April, or May, or June, 1854. I think I saw a fence in July, 1854. My recollection of it is that it was a fence similar to the one we had built: posts. The one we built had a cap. I don't know whether a board or joist. That on the side I should call a board. In July, 1854, my impression is that there were two boards on the side. Something excited me to make inquiries. I don't know that this was an entirely new fence built by somebody else. I can't say but it might have been carried away. I had care of the lot for nine years. I took very poor care of it. I thought the title not good; thought city had title, and I did not care to expend any money for it. I never paid any taxes or street assessments. I was applied to pay as-

sessments and so forth, but refused. Some time in the summer of
146 1854 I was there. I have seen it at different times from 1855 to 1860.
I sold Parker's interest to either Townsend or Munford; the deed was made to Munford. I negotiated for sale of interest when the sale was made. The deed was made to Munford. I do not know Munford. He paid me, I think it was fifty dollars, for it. I think it was $50 he paid. I saw a small building, the one witness spoke of, I think on the Leavenworth side of the lot. I think I first saw it about a year after Parker fenced it. That was one of the things that made me make inquiries. Vogel, I think, went to the States. Mr. Hart is dead.

Re-examined.

On re-examination witness said:
Hart was a relation of mine—a step-son.
Question by the defendants' attorney. At the time you saw the lot between 1855 and 1860, did it have a fence on it?
Answer. It was not always fenced on the Leavenworth side. In 1860 or 1861 I think it was not fenced. I can't tell about the fence on Clay street at the other times I saw the lot.

Cross-examined.

Cross-examination:
I do not remember whether there was any fence there on the first
147 day of January, 1855, or on the 20th day of June, 1855. I can't say whether there was a fence there or not. I think there was.

Re-examined.

The fence, if any, June 20, 1855, was similar to the one we built; I can't state the exact day when the fence was made. The fence on the north and east side of the lot, made by Parker, was made on Saturday, the sixth day of August, 1853, by Parker, Charles Burnham, Charles Vogel, the teamster, and myself.

John Laws for defendant.

Said defendants then called, as a witness in their behalf, one John Laws, who testified as follows:
In March and April last I was working for Hyde & Chester, contractors for raising and moving buildings. I know fifty-vara lot number 1188, at southwest corner of Clay and Leavenworth streets. I assisted in moving a building from Jane street between Mission and Howard and Third and Fourth streets, and placing it upon lot 1188. We first raised the house up, moved it into Jane street, and put it upon wheels. Mr. George Fitzgerald worked with me. After this was done the horses were hitched to the truck and the house hauled directly up to the lot on Leavenworth street before we stopped.
We started with the house from Mission street between 7½ and 8½
148 o'clock in the morning, and got the house up on the lot 1188 before 12 o'clock noon of the same day. It was then raining some, and we hurried and got the house off the wheels as soon as we could so as to let the teamster go back with his teams. We then moved the house upon the lot. We kept on working without stopping until we got it on the lot, and then went home to dinner. By that time it had quit raining. We came back after dinner and turned the house around, as it appeared we had placed it the wrong side towards the street. We then lowered the house down considerably, and then left it there on the lot between four and five in the afternoon

of the same day. It was some time before dark that we left it there. I am perfectly sure of this. This was all done on the same day, and between seven o'clock in the morning and six o'clock in the afternoon of the same day.

Cross-exam'd.

On cross-examination said witness testified :

It rained some in the fore part of the day. My impression is that it was a fine day after it stopped raining. When a house is on a truck we do not generally stop from moving it on account of rain. It took us between one and two hours to get the house moved off the wheels upon the lot. I
149 am not mistaken in my recollection that the house was put on the lot the same day it was hauled up there. I am as certain of it as that I am now here.

John W. Morton for defendant.

Said defendants then called, as a witness in their behalf, one John W. Morton, who testified as follows :

I reside in the city of San Francisco. In March and April last I was engaged as a teamster in hauling. I recollect hauling a small house from Mission street to the fifty-vara lot on the southwest corner of Clay and Leavenworth streets. About the 1st of April last Mr. Geddes, who has already testified in this case, employed me to haul it. It was standing on wheels. I hitched my teams on and started with the house from Jane street, between Howard and Mission streets, not a great way from nine o'clock in the morning, and proceeded with it directly to said lot. I reached the lot at the corner of Clay and Leavenworth streets at about 11½ in the forenoon. I got the truck out as soon as I could and went home. I got home before 12 o'clock noon of the same day.

Cross-exam'd.

On cross-examination said witness stated :

We got the house off the wheels as soon as we could. It was rain-
150 ing considerably at the time. It began to rain just after we started with the house ; should call the distance about a mile. We started with eight horses, but afterwards, finding we had not enough, put on two span more. When I left the house it was standing on Leavenworth street, on blocks. I don't think it was raining when we started. I did not get anything extra for hauling on that day. I hauled the house for Mr. Geddes. There was no specific price agreed upon between us. I was to have what it was worth.

William H. Hyde for defendants.

Said defendants then called, as a witness in their behalf, one William H. Hyde, who testified as follows :

My business in March and April last was that of raising and moving buildings. I was and am one of the firm of Hyde & Chester, of this city. John Laws, the witness who has testified in this case, was in our employ in March and April last. I know fifty-vara lot number 1188. About the last of March or first day of April last I moved a small house into Jane street near Mission, and also moved on that lot at the corner of Clay and Leavenworth streets. I did this for Mr. Geddes. I accompanied the house to the lot. We started with it from Jane street somewhere from eight to nine o'clock in the morning and reached the lot with it not far from twelve
151 o'clock noon. I know we had the house on the lot at one o'clock in the afternoon. We worked from about twelve till one in getting it

moved from the street upon the lot, and then went to dinner. That morning was misty, and it looked like rain. It rained when we had got to the corner of Mason and Post streets. After we had got our dinner we went back and turned the house around and let it down and levelled. We got through with this some time before six o'clock in the afternoon. I don't know the exact time, but I am certain it was not so late as six o'clock. It did not become dark nor did the sun set, I think, at that time until after six. The whole of this work was done within the working hours of the same day. I saw the lot two or three days before I moved the house upon it. I went there to see where the house was to go to. All that time I saw no improvements upon the lot, except the remains of an old fence. On Clay street it was tolerably good, but on Leavenworth street there were only some fragments of a fence lying on the ground. I did not take any fence down to get the house on the lot. I observed no signs of occupation on the lot. The house was ready for moving the morning that we started with it. It had been put on the truck the night before.

152 *Cross-exam'd.*

On cross-examination said witness stated as follows :

The building was on the lot by one o'clock p. m. It rained pretty hard at one time. Mr. Townsend was not with me at the lot at any time. I noticed some fence on Clay street partly buried in the sand. We were directed not to have the house blocking up the street, but to get it on the lot. It was understood that we should put it on the lot when we got it up there.

Re-exam'd.

On re-examination said witness stated :

This direction not to leave the house standing in the street was not an unusual one. It would be an unusual thing for me to let a building stand in the street for any length of time after it was moved.

John W. Murray for defendants.

Said defendants then called, as a witness in their behalf, one John W. Murray, who testified as follows :

My business in March and April last was raising and moving buildings. I was at fifty-vara lot, number 1188 last spring a week or two before Powelson's house was moved on. I went with a Mr. Clark to look at the house on Jane street, and at the lot to see about moving it. I went across the lot, and came out on Leavenworth street. I saw nothing to obstruct our
153 moving a house on said lot; saw we could move it on from Leavenworth street. On the Leavenworth street side there were some pieces of boards lying on the street, but no fence and nothing to obstruct moving a house in on that side ; there was no enclosure on that side. I saw nothing on the lot except some old fence on the Clay street side. I did not see any person on the lot or occupying it.

Cross-exam'd.

On cross-examination said witness stated :

I did not notice the fences on the south and west sides of this lot. There were no obstructions on Leavenworth street to moving a house on except a bank some five feet high. It was not a picket fence that was lying down on Leavenworth street, but some strips 4 or 5 feet long. I saw some pieces of boards lying down, which I supposed were parts of what had been a fence. I have not talked with Mr. Townsend to-day or any other day in regard to this suit. Clark spoke to me about this lot, of moving the house, and asked me how much I would charge.

Anthony Boyer for defendants.

Defendants then called, as a witness on their behalf, one Anthony Boyer, who testified as follows:

I reside on the southeast corner of Leavenworth and Clay streets, in the city of San Francisco. I have resided there about twelve months
154 last past. I keep a grocery store and have my family there. I am a baker by trade. I know fifty-vara lot number 1188. Since I have resided there nothing has been done on said lot 1188 until the present house was moved on it. There has been a portion of fence on Clay street, but no fence on Leavenworth street since I have been there. There has been no person occupying that lot or doing anything with it since I went there until Powelson's house was moved on. The day that Powelson's house was moved on I left my house in the morning at about five o'clock and went to my work on Third street, and returned home between five and six o'clock in the afternoon of the same day. The house was then on the lot as it now stands when I returned in the afternoon, but was not there, neither in the street nor on the lot, when I left home in the morning. There was no house there when I went away in the morning, but when I returned in the evening the house was on the lot where it now stands. I think there was a light in the house on the evening after it was moved on. Mr. Powelson, the defendant, who lived in it, came over that evening after some candles. I did not see any light in the house on the following morning when I left for my work, nor did I see any men about the house nor hear the sound of hammers or
155 of workmen in or about it.

Cross-examined.

On cross-examination said witness stated:

I don't think I ever saw any fence on the Leavenworth street side of this lot. I noticed the light in the house that evening, because the house had just been moved on the lot that day.

D. B. Hughs for defendant.

Defendants then called, as a witness on their behalf, one D. B. Hughs, who testified as follows:

I reside in the city of San Francisco. My business is and has been for some years past that of a street contractor. I graded Leavenworth street from Sacramento to Clay street. I was the contractor for that work. I graded that street in front of fifty-vara lot 1188, in May and June, 1861. There was a passage-way that had been graded through Leavenworth street before the grading that I did. I finished that grading about the 10th or 12th of July, 1861. The effect of the grading was to cause the fence on the Leavenworth street side of fifty-vara lot No. 1188 to fall down. The upper end of that fence nearest to Clay street stood twenty inches over the line of Leavenworth street, and in the street. The lower end towards Sac-
156 ramento street stood nearly on the line of the street. There was a flag put upon the Clay street fence to indicate the line of Leavenworth street. From the time I did this grading there was no fence upon the line of Leavenworth street on lot 1188. There was only the remains of an old fence lying about there until the present house was moved on the lot. Since that house was moved on I have seen a new fence around the lot. Whilst I was doing this grading, and until the October following, I resided on Leavenworth street, about midway to the block next to that in which lot 1188 is situated; and I passed by that lot as often as once or twice a week. From the time I did that grading until the present house was put on lot 1188, I never saw any fence on the Leavenworth street side of that lot.

From the time I did the grading there I never saw any occupation of said lot, nor any house upon it until the present house, occupied by Powelson, was moved on it.

Cross-examined.

On cross-examination said witness stated:

The grade of Leavenworth street was about 10 feet below the surface at the crossing of Clay, and about 12 feet below next to Garthwaite's lot. The fence stood either in the street or so near the line that it had all to come down when the grading was done. I am certain that all the fence
157 on the line of Leavenworth street, on the side of lot 1188, came down from the grading. When I got through grading the fence was all lying along the bank.

Harrison P. Eayres for defendant.

Defendants then called, as a witness on their behalf, one Harrison P. Eayres, who testified as follows:

I have resided in San Francisco since the early part of the year 1853. I know fifty-vara lot number 1188; have known it since some time between July and September of that year. I then resided at 116 Front street, where I had my business; I slept there. I recollect seeing this lot number 1188, in the latter part of the summer of 1853. I was out there for the purpose of leasing a lot. I saw at that time some boards and posts upon this lot 1188. On the Clay street side the fence was standing. I don't remember particularly about the fence on the Leavenworth street side. The lumber of the fence was all there, either standing or lying on the ground. I recollect the day of the week that I was there; it was Sunday; I don't recollect the day of the month. I am certain it was the latter part of the summer of 1853. The fence which I saw there then was composed of posts set or driven in the ground, and one piece on the top, and one on the side; the one on
158 the side I should think about 4 inches wide. The top piece was nailed on flat as a cap; I don't recollect the description of the piece which was on the top. The posts were square sawed lumber about 3 by 3, or 3 by 4 inches, the ordinary size for fencing at that time. I was over at the lot twice in 1854; that is, in the latter part of the summer of 1854. This lot 1188 was then fenced. All the lots in the neighborhood appeared to be fenced at that time. The fence which I saw on lot 1188, in 1854, appeared to be the same which I had seen in 1853. I can't say how old the fence then was. In 1853 the boards and posts which I saw on this lot, were sufficient to have constructed an enclosure of it. On the first day of April last I was working for Mr. Loring on Sacramento street, the first house from Leavenworth street. I recollect seeing the house which Powelson now lives in go by on wheels on Leavenworth street. It had horses attached to it, and was accompanied by several men. It was in the forenoon before twelve o'clock in the day Afterwards, and probably about 5 minutes before 1 o'clock of the same day, I went up to lot 1188, to see if I could get a lot. I saw the house then standing on the lot 1188. I had been in the habit of passing by that
159 lot frequently during the two years next previous, and, to the best of my recollection, there was no fence on the Leavenworth street side of that lot standing during that time, though there were pieces of fence lumber lying on the ground. I don't recollect seeing any fence standing on Leavenworth street side of this lot during that time. I never saw any person occupying that lot until the house was moved on it in April last. The westernmost line of Carlton's carpenter shop to the south of this lot is sixty-six feet west from the west line of Leavenworth street. I know because I have measured the distance.

Cross-examined.

On cross-examination said witness further testified as follows:

I have talked with Mr. Townsend in regard to the testimony in this case about 2 months ago, the first time; never talked to me since, except to ask me to go and measure the distance. The little shanty stood from Leavenworth street. This was last Monday. I was not on the lot in 1853. I said I knew the lot; I can't swear that I was on the lot. I think I was on Clay street, near the corner of Leavenworth and Clay. I have not said I was on the lot in 1853. I think I went along Clay street in 1853. At that time the condition of Clay street was sand and shrubs, like most of the streets.
160 There was a road for foot passengers. The trees, and stumps, and chapperall was tolerably thick. I don't know, definitely, the south line of Clay street at that time. A man with me pretended to know. We passed along Clay street at that time. In 1853 there was something in particular to call my attention to the lots in the neighborhood. My attention has not been particularly called to that spot from 1853 and 1854, till the last year or two. I had an interest in that lot. In 1853 I think I saw some fence on the south line of lot 1188. This is my impression and not recollection. My impression is that the fence on that line was up for a distance of about 30 feet, and that there was lumber there to finish it out. Nobody was there except the person with me and myself. There was no fence that I recollect on west side of lot. I do not know where Mr. Hayn's lot was at that time. I can't say whether there was any fence on the west side of the lot at that time. I have no recollection of any fence on the south side at that time. I am positive the day I saw it there was on Sunday. I was not there again till the following year in 1854. My attention was not called to it more than that the party who was with me at the time spoke of this fence and called my attention to it. There was nothing to call my
161 attention to the character of the fence at that time. It is only a general impression that I have. The only thing I know about it is that we were going to look at a lot, and in coming down he said that this was Clay street. When we got down to the corner of Leavenworth we saw this lot. To the best of my knowledge no buildings were in the immediate vicinity. I don't recollect any. I don't remember that any visible streets were laid out. In 1854, as near as I can remember, that lot was fenced in on all sides. I think there was a house on the lot west of 1188, and my impression is, on the south. I don't think I ever saw any fence on Leavenworth street till 1854. The fence on Leavenworth street a year ago was lying on the bank. There was nothing particularly to call my attention to the fence on Leavenworth street. Last March, to the best of my belief, the fence was lying on the ground. I can't say whether the whole fence or not. I know I saw portions of it projecting over the bank. I could see some pickets. I should think I saw it last about 12 days before the house went on the lot. I saw the house go by, and on that day I went to see the house, and saw Mr. Clark. It must have been within about five minutes to 1 o'clock p. m., as I was at Loring's house at that hour. The house was then on the lot. I
162 had to go up to the bank to get to it. I did not see Powelson, but Clark was there.

Re-examination.

I think I first mentioned having knowledge of this lot. If I recollect right, I first mentioned it to Clark at the time the house was moved on the lot.

Cross-examined.

On the same day that the house was moved on the lot, I met Clark, and I

mentioned to him that I once thought of leasing that lot in 1853, if I could find an owner to it; I stopped there that day from one to two minutes. I did not tell him at that time; it was in the after part of the same day, after working hours, I talked to him. I don't know as it was of any interest to anybody at that time whether I saw the lot in 1853.

Louis Lackman for defendant.

Defendants then called, as a witness on their behalf, one Louis Lackman, who testified as follows:

I reside in the city of San Francisco, and resided here in 1853. I am a tailor by trade. In 1853 I bought a lot on the southwest corner of Sacramento and Leavenworth streets; I bought that lot about December 1853; I was over in that neighborhood previous to that; I was over there first
163 about the end of August, 1853; I recollect fifty-vara lot number 1188, on the southwest corner of Clay and Leavenworth streets very well; I was at that lot several times in that year; I recollect that lot when I went over there in 1853, with a Mr. Gaylord to buy a lot. Mr. Gaylord showed me several lots about there. He showed me, among others, the two lots on the west side of Leavenworth street between Sacramento and Clay streets. I asked him to whom they belonged he said he did not know to whom the lot number 1188 on the southwest corner of Clay and Leavenworth streets belonged, but that the other one south of it belonged to Sparks, and was all divided up, so I bought the fifty-vara lot on the opposite side of Sacramento street, on the corner. I recollect the condition of fifty-vara lot number 1188 at that time very well; I stood in front of it on Leavenworth street. There was a fence along the whole line of that lot on Leavenworth street, made of sawed posts, and one board on the side and one on the top. I recollect very well, that along the front of this lot on Leavenworth street there was a fence of posts, and one board on the top and one on the side. I did not go inside of the lot; I stood in front of it and looked at it. This was in August, 1853; I don't recollect the exact day; I did not go down on the Clay street side of this lot. It was fenced the whole length of the lot on the Lea-
164 venworth side. I am sure of that, but don't know if it was fenced on the Clay street side. There was a fence between this lot 1188 and the lot on the south side of it, which ran back some distance from Leavenworth street. The posts of the fence on Leavenworth street were of middling size, not exactly square—wider one way than the other. The wood was hard, and it seemed to me some kind of white wood. I do not know what kind of wood it was; it was not red wood; they were sawed posts. I do not understand or speak the English language very well. When I came to this country I could not speak it at all; I bought my lot in 1853, and built my house in 1854. From August, 1853, when I first saw fifty-vara lot No. 1188, I passed by it nearly every week until I commenced to build upon my lot. I went by it along Leavenworth street I did not go along Clay street side of this lot. I remember seeing this fence on lot 1188 for two years after I first saw it there. There was a picket fence afterwards put up. I built my house in 1854, and resided in it until I sold it about a year and a half ago. I passed by this lot 1188 from August, 1834, every week or so; some weeks I passed but once, and some weeks twice. I always saw the fence on Leavenworth street when I passed.

165 *Cross-examined.*

On cross-examination said witness testified as follows:

The time that I was first at lot 1188 was between the 25th of August and the first of September, 1853; I am certain as to the month, because I loaned

an acquaintance of mine some money on the 10th of August, which money I wanted to use in buying me a lot, and he paid it back to me on the 29th of August. I held his note for it, which I then returned to him; I was out by this lot 1188, looking for a lot to purchase, some 2 or 3 days before this money was paid back to me. This makes me now certain in regard to the time I saw the fence there. The person to whom I loaned the money is not here. I think now Mr. Hayn's house was on the lot west of 1188 when I built my house in 1854. I never talked with Mr. Townsend about this suit. I was subpœnaed here as a witness.

Re-examined.

On re-examination by defendants said witness stated:

I began to work at my trade for a Mr. Wood on July 1st, 1853, and on the first of August following he paid me my month's wages, which was one hundred and fifty dollars. This was the money that I loaned to the acquaintance whom I have mentioned. I know it was in 1854, and that I am
166 not mistaken in the year. I came here in March, 1853, I lent my money on the 10th. It was paid back to me on the 29th of August, 1853.

Re-cross-examined.

On the re-cross-examination said witness stated:

I am certain that I built my house in 1854. A Mr. Carlton built it for me. I saw a fence extending part way back on the south side of lot 1188, between it and the adjoining lot, at the time I saw the fence on Leavenworth street.

Defendants then offered in evidence a certified copy of the petition of the city of San Francisco, filed on the second day of July, A. D. 1852, before the board of United States land commissioners appointed and sitting under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," said copy being certified to be a true copy of said petition by the United States surveyor general of California, and with said certificate thereto annexed, being in the words and figures following, to wit:

Cert. copy of petition of city and county of San Francisco to board of U. S. land commissioners, filed July 2, 1862.

To the honorable the board of commissioners to ascertain and settle private land claims in the State of California.

The petition of the city of San Francisco, a municipal corporation
167 of the said State of California, respectfully shows that the said city claims a tract or parcel of land situate in the county of San Francisco and State aforesaid, and being so much of the peninsula where said city is located as will contain an area equal to four leagues square, said parcel or tract being bounded on the north and east by the waters of the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line including the area aforesaid. In pursuance of the law, usages, and customs of the government of Mexico, and an act of the departmental legislature of California, of November 9, 1833, and proceedings in pursuance thereof, the pueblo of San Francisco was duly erected and constituted a municipal corporation with a municipal government, and with all the rights, properties, and privileges of pueblos under the then existing laws—during the said year 1833; and there was then and there by the supreme government of Mexico, in the manner by law prescribed, ceded and granted to the

said pueblo for town land, for common land, all and singular the premises herein first described. The said pueblo contained and was the proprietor of all and singular the said premises, (except so much thereof as had
168 been granted to the authorities of said pueblo in pursuance of law,) and the said pueblo continued its existence as such municipality and proprietor until and after the accession of the government of the United States, July 7, 1846, and until, by an act of the legislature of the State of California, entitled An act to incorporate the city of San Francisco, the inhabitants and property of said pueblo were incorporated into a city, which city is now exhibiting her claim to the premises aforesaid. The said act of the legislature of the State of California is prayed to be taken and read as a part of this petition. The same act was modified and changed by an act of the same legislature, passed A. D. 1851, which is also asked to be taken and read as a part of this petition. On the 7th day of July, A. D. 1846, the then pueblo, now city of San Francisco, was a town of the population of about one thousand inhabitants, and on the third of March, A. D. 1851, the population thereof amounted to about thirty thousand persons, and that on said 7th of July, and on said third of March, the said pueblo and city, under and by virtue of the laws, usages, and customs of the government of Mexico and California, and all and singular the premises aforesaid, (except
169 as aforesaid,) were part and parcel of the lands and premises of said pueblo and city.

There were several adverse claims to the one herein set forth. One Jose de Jesus *et al.* claims one square league, part of said premises, as particularly appears by his petition therefor, now before the board, numbered 17 on the docket of claims.

That Carmen Silvian de Bernal and Jose Cornelia Bernal claim one square league, part of said premises, which claim is more particularly exhibited in the petition therefor before your board, numbered thirty on the docket of claims.

That Jacob Luis Leese and Salvador Vallejo claim two hundred varas square, part of said premises, which claim is particularly exhibited in their petition therefor before your board, numbered 74 on the docket of claims.

That James R. Bolton claims three square leagues, (with exceptions,) part of said premises, which claim particularly appears in his petition before your board, and numbered 81, according to the docket of claims.

That Josefa de Haro and others claim the "Potrero de San Francisco," being one half square league, part of said premises, the particulars whereof appear in their claim before your board, numbered one hundred and one on the docket of claims.

That John F. Shultess and others claim thirty-seven fifty-vara lots,
170 part of said premises, particularly described in his petition on file with your board, numbered 171, according to the docket of claims. That the said John F. Scheltess also claims forty-seven other fifty-vara lots, part of said premises, particularly described in his petition before your board, and numbered 172 of claims.

That Josefa de Haro and others claim premises known as the Laguna de la Merced, one league long and one half league wide, and particularly described in their petition before your board, numbered one hundred and two of claims, and which is also part of premises herein first described.

That one Thomas O. Larkin claims a tract of land, parcel of said premises, and including a portion of the incorporated limits of the city of San Francisco to the west, and running thence westerly along the waters of the bay to the Pacific Ocean, including the site of the presidio. The quantity or particular description of his claim this claimant is unable to state.

That Charles V. Stuart and Frank N. Thorn claim a portion of said prem-

ises, known as Ridley's Ranch, under a grant to Jacob P. Leese, of one league and one half, situate contiguous to and north of the Sanchez
171 Ranch; but a particular desoription thereof cannot be given by claimant. The claimant represents to your honorable board that all and singular the foregoing adverse claims are insufficient and void; that all of them were made subsequent to the establishment of the pueblo San Francisco, and that the grounds therefor were in derogation of the lawful claim and right of the said pueblo. That some of them were made after the authority of the government of Mexico, in the department of California, had been superseded by the authority of the government of the United States. That such is the fact, particularly in the case of the land claimed by James R. Bolton as aforesaid, and in the case of the land claimed by Thomas O. Larkin as aforesaid, and also in the case of the lands claimed as aforesaid by John Shultess, and by John F. Shultess. That all of said claims are based upon grants made without authority of law, and in direct violation of the laws and regulations of the government of Mexico in force in California.

That said city of San Francisco now insists that by the treaty of Guadalupe Hidalgo, the laws of nations, and the laws, usages, and customs
172 of the government of Mexico in force in California, as also by force of the act of the legislature of said State, incorporating the said city, and the act of the Congress of the United States, entitled "An act to settle the private land claims in the State of California," approved March 3, 1851, the said city has good and lawful claims to all and singular the premises aforesaid; and said city relies upon the said laws, usages, and customs and proceedings in pursuance thereof, upon the order made for the establishment of the pueblo of San Francisco, the record, and other evidence of its existence, continuance, and extent, the grant to said pueblo as aforesaid, and upon such other evidence as may be adduced, touching the premises; upon a full exhibition and consideration of all which premises, it it is prayed that such claim be confirmed.

J. A. McDOUGALL,
For the city of San Francisco.

Endorsed: No. 280. City of San Francisco. Petition. Filed in office July 2, 1852.

GEO. FISHER, *Sec'y.*

173 Recorded in Record of Petitions, vol. 1, page 151.

GEO. FISHER, *Sec'y.*

U. S. SUR. GENERAL'S OFFICE,
San Francisco, Cal.

I, J. W. Mandeville, surveyor general of the United States for the State of California, and as such having in my charge and custody the papers of the late board of land commissioners to ascertain and settle private land claims in California, do hereby certify the foregoing pages, numbered from one to five, inclusive, exhibit a true, full, and correct copy of the original petition, together with the endorsements thereon, as the same appear on the file in my office in case No. 280 on the docket of said board of commissioners.

In testimony whereof, I have hereunto signed my name officiL. S.] ally and affixed my seal of office, at the city of San Francisco, this 6th day of September, A. D. 1858.

J. W. MANDEVILLE,
U. S. Sur. Gen'l, Cal.

174 Said defendants likewise offered in evidence, in connection with said petition, a certified copy of the decree of said board of land commissioners thereupon made, and filed in the office of the secretary of said board on the 21st of December, A. D. 1854, confirming to said city a tract of land therein described, said last-mentioned copy being likewise certified by said surveyor general to be a true copy of said decree, and, with said certificate thereto annexed, being in the words and figures following, to wit:

Certified copy decree of b'd of U. S. land com.

CITY OF SAN FRANCISCO
vs.
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed. The land of which confirmation is made is that known by the name of the pueblo lands of San Francisco, and is bounded as follows: Beginning at the little cove to the east of the fort, and running across to the beach so as to leave the fort and casamata to the north; thence running along the beach to Point Lobos on its southern part; thence a straight line to the summit of the Devisadero; thence con-
175 tinuing said line to the east as far as the Punta del Rincon, including the Canutales and El Gentil, the said line will terminate within the bay of the Mission of Dolores, the estuary of which will form a natural boundary between the municipal jurisdiction of that pueblo and the said mission of Dolores; thence along the shore of the bay of San Francisco as it existed in the year 1834, to the point of beginning. For a more particular description reference to be had to the copy of the order from Governor Jose Figueroa to General Mariano G. Vallejo, dated Monterey, November 4, 1834, marked Exhibit No. 18, to the deposition of M. G. Vallejo, taken in No. 280, H. J. T., and now on file among the papers in the case.

ALPHEUS FELCH.
R. AUG. THOMPSON.
S. B. FARWELL.

Endorsed: No. 280. City of San Francisco, San Francisco. Decree of confirmation. Filed in office Dec. 21, 1854.

GEO. FISHER, *Sec'y.*

U. S. SUR. GENERAL'S OFFICE,
San Francisco, Cal.

I, J. W. Mandeville, surveyor general of the United States for California, and as such having in my office and in my charge and custody the
176 papers of the late board of the U. S. land commissioners to ascertain and settle private land claims in California, do hereby certify that the foregoing papers, numbered from one to two, inclusive, exhibit a full, true, and correct copy of the original decree of confirmation, together with the endorsements thereon, as the same appear on file in my office in No. 280 on the docket of said board.

In testimony whereof, I have hereunto signed my name officially
[S. L.] and affixed my seal of office, at the city of San Francisco, this 6th day of September, A. D. 1858.

J. W. MANDEVILLE, *U. S. Sur. General, Cal.*

And the court then and there inquiring of said defendants and requiring them to state by what proof they intended to follow said documentary evi-

dence aforesaid, said defendants thereupon then and there offered further to prove that the fifty-vara lot number eleven hundred and eighty-eight, (1188,) including the premises in dispute in this action, are a part of the land described in said decree, and so confirmed to said city of San Francisco,

177 and that the appeal from said decree of said board of land commissioners provided for by law was on the 30th day of March, A. D. 1857, duly dismissed in and by the U. S. district court of the northern district of California, in which district said land confirmed was and is situated, and that said decree of said board of land commissioners had become a final decree. And defendants then and there further offered, in connection with the foregoing proposed proof, to deraign title to said fifty-vara lot number 1188, and to the premises in dispute under said confirmation, from said city of San Francisco to James E. Munford, by legal conveyances thereof duly executed and delivered since the making of said decree of confirmation, and since the dismissal of said appeal therefrom, and prior to said 28th day of March, A. D. 1862, and offered to justify the acts of said Townsend done in reference to said lot and premises under and by proving and giving in evidence a power of attorney from the said Munford to the said Townsend duly executed, acknowledged, and delivered by the said Munford to the said Townsend before said 28th day of March, A. D. 1862, and then in full force, authorizing and empowering him, the said Townsend, to take possession of

178 all lands and real estate then belonging to him, the said Munford, or which he should thereafter acquire in the State of California, and to manage, control, and lease the same; and likewise offered to justify the entry of the said Powelson into and upon said lot and premises in dispute, under and by proving and giving in evidence a lease of said fifty-vara lot and premises from the said Munford to the said Powelson, bearing date said 28th day of March, A. D. 1862, and duly executed and delivered by the said Munford (acting by his said attorney in fact, the said Townsend) to the said Powelson, before the said Powelson's said entry, the term mentioned and granted in and by said lease commencing on the 1st day of April, A. D 1862, and continuing for the 12 calender months next thereafter.

And the court then and there inquiring further of said defendants, and requiring them to state by what means and in what porticular manner they expected and intended to deraign and show title in the said Munford under and from the said city of San Francisco, said defendants thereupon then and there offered to deraign and show such title under and by virtue of a certain judgment in favor of one G. C. Wardwell against said city of San Francisco for the sum of one thousand and fifty dollars and costs, duly rendered

179 and recorded in and by the superior court of the city of San Francisco (a court of competent jurisdiction) on the 25th day of March, A. D. 1856, and duly docketed in said court and in said city and county of San Francisco on the 27th day of March, A. D. 1856, and thereafter, to wit, on the 12th day of January, 1858, in pursuance and by authority of law, duly transferred to and made a record of the 4th judicial district of California, and under and by virtue of a certain writ of execution thereafter issued upon said judgment in due form of law out of and under the seal of said district court, bearing said date 12th day of January, A. D. 1858, directed to the sheriff of said city and county of San Francisco, and to said sheriff thereafter, to wit, on said 12th day of January, A. D. 1858, duly delivered, commanding him, the said sheriff, to satisfy the said judgment, together with interest and costs of suit, out of the personal property of the said city of San Francisco, or, if sufficient thereof could not be found, then out of the real property in said city belonging to said city, on the day when said judgment was docketed in city and county, or at any time thereafter, and to make return thereof to the said court within 60 days thereafter; and

under and by virtue of a sale of said fifty-vara lot and premises in dispute, made by said sheriff in due form of law, and upon due and legal no-
180 tice, on the 13th day of February, A. D. 1858, to me, F. O. Wakeman, under and by virtue of said judgment and execution, and a deed of said lot and premises, bearing date the 18th day of November, A. D. 1851, duly executed and delivered in due from of law by the sheriff to the said Wakeman under and in pursuance of said sale, and under and by virtue of mesne conveyances of said lot and premises, transferring to the said Munford, prior to the said 28th day of March, A. D. 1862, the title so acquired by the said Wakeman.

And said defendants further offered and claimed the right to give in evidence said petition, decree of confirmation, and dismissal of appeal, and to prove that said lot and premises were part of the land confirmed, for the purpose of showing that the title to said fifty-vara lot and premises in dispute had been by the United States of America thereby duly confirmed, granted, and passed to and thereby vested in the said city of San Francisco, under said act of Congress of March 3d, 1851; and said defendants claimed that the said Munford had acquired the same title from said city, by means of said sheriff's sale and deed, and the other mesne conveyances before mentioned, but that if the said defendants were mistaken in this, and if
181 the said Munford had not so acquired said title from said city, and if the city ordinance, known as the "Van Ness ordinance," and the legislative act confirmatory thereof, was operative and effectual to pass said title out of said city of San Francisco to any one, that then the said Munford had acquired it under and by virtue of the actual possession of said lot and premises by the said James W. Parker, (already proved, and which they proposed still further to prove,) and under and by virtue of the said "Van Ness ordinance," and the act of the legislature of California, passed March 11, 1858, purporting to confirm the same, and the deed from the said Parker to the said Munford, already given in evidence, and that if the said Munford had not acquired said title in either of said ways, that then the same remained vested in said city of San Francisco.

Thereupon said plaintiff objected to the admission of said evidence so offered by said defendants, or of any part of it, on the following grounds, to wit:

1st. That said evidence, if admitted, would not show any title in the United States government at any time.

2d. That it has been decided, and is the law of this State, that in June, 1855, and before that even, from the acquisition of California from
182 Mexico, that the title to the land in question belonged to the city of San Francisco, and that the city had the right to dispose of the land, and exercised that right in disposing of the land in question, by an ordinance passed June 20, 1855, commonly called the "Van Ness ordinance."

3d. That it is the law of this State that this land, embracing the land in question, was never, at any time, subject to seizure and sale on execution against the city; that therefore the title to the land in question cannot be affected in any way by the introduction of evidence offered by the defendants.

4th. That the papers offered are entirely incompetent to prove a title in the city of San Francisco, because that question has been settled by the supreme court of this State, as to whether the city had the right to the land.

Thereupon the court sustained said objections, and excluded said evidence from the jury, to which ruling of the court said defendants then and there excepted.

Said defendants then offered and read in evidence to the jury a certain power of attorney from the said James E. Munford to the defendant, James

B. Townsend, bearing date October 25, 1859, and thereafter ac-
183 knowledged and duly recorded in the recorder's office of San Francisco City and County, which power of attorney, with the certificate of acknowledgment and certificate of record thereto annexed, are in the words and figures following, to wit:

Power of attorney—James E. Munford to James B. Townsend.

Know all men by these presents that I, James E. Munford, of the city and county of St. Louis, in the State of Missouri, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, James B. Townsend, esq., attorney-at-law in the city and county of San Francisco, in the State of California, my true and lawful attorney in fact, for me and in my name, place, and stead to take, and, by suits, and all necessary legal proceedings, to recover possession of all lands and real estate now belonging to me, or which I shall hereafter acquire in the State of California, to manage and control the same; to lease, without covenant of title, mortgage, grant, bargain, sell, release, and convey the same, or any part thereof, or any interest therein, by deed of quitclaim only, as he shall think proper, to bring and prosecute to final judgment and execution all suits which he shall think proper relating to such property, and to defend all suits brought relating to it, and to compromise any adverse claims or suits, and to
184 collect all rents or sums of money due or to become due on account of any such land or real estate in said State of California; giving and granting unto my said attorney full power and authority in and about the premises, and to use all due means, course, and process in the law for the full, effectual, and complete execution of the business, and in my name to make and execute due acquittances and discharge, and for the premises to appear, and the person of me, the constituent, to represent before any governor, judge, officer, and minister of the law, whatsoever in any court or courts of judicature, and there on my behalf to prosecute for debt, fraud, and any manner of claim I, constituent, may have against any person or persons, and to answer, defend, and reply unto all actions, causes, matters and things whatsoever relating to the premises; and, generally, to say, do, act, transact, determine, accomplish, and finish all matters and things, whatsoever, relating to the premises, as fully, amply, and effectually, to all intents and purposes, as I might or could do if personally present, although the matters should require more special authority than is herein comprised, hereby ratifying, confirming, and holding valid all that my said attorney shall lawfully do, or cause to be done, by virtue of these presents.

185 In witness whereof, I have hereunto set my hand and seal the twenty fifth day of October, in the year one thousand eight hundred fifty-nine, (1859.)

JAMES E. MUNFORD. [SEAL.]

Signed, sealed, and delivered in presence of—the words "without covenant of title" and by "deed of quitclaim only," were interlined, and the two lines in one place and about three in the other were erased before signing—

EDW'D W. SHANDS.
S. PEINT. RAWLES.

STATE OF MISSOURI, *County of St. Louis, ss:*

On this 25th day of October, A. D. 1859, personally appeared before me, Edw'd W. Shands, a commissioner for the State of California, James E. Munford, to me personally known to be the person described in and who executed the within power of attorney, and who acknowledged to me that

he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

186 In witness whereof, I have hereunto set my hand and affixed my official of office in St. Louis, Missouri, the date last aforesaid.

[L. S.] EDW'D W. SHANKS, *Commissioner.*

Recorded in the office of the county recorder of the city and county of San Francisco, June fourteenth, 1862, at fifty-seven minutes past three o'clock p. m., in Liber 12, Powers of Attorney, page 429.

T. YOUNG, *County Recorder.*

Said defendants then offered and read in evidence to the jury a certain lease executed by the said James E. Munford, (acting by the said James B. Townsend as his attorney in fact,) to the said defendant, John P. Powelson, bearing date March 28th, 1862, which said lease is in the words and figures following, to wit:

Lease—J. E. Munford by J. B. Townsend, his attorney, to Jno. P. Powelson, March 28, 1862.

This indenture, made and entered into this 28th day of March, A. D. one thousand eight hundred and sixty-two, between James E. Mumford, of the city and county of St. Louis, State of Missouri, party of the first part, and John P. Powelson, of the city and county of San Francisco, State of California, party of the second part, witnesseth, that the said party of

187 the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained on the part and behalf of the party of the second part, his executors, administrators, and assigns, to be paid, kept and performed, has granted, demised, and to farm letten, and by these presents does grant, demise, and to farm let, unto the said party of the second part, his executors, administrators, and assigns, all that certain lot of ground situated and being in said city and county of San Francisco, State of California, which is bounded and described as follows, to wit: Commencing at the point where the western line of Leavenworth street intersects the southern line of Clay street; thence westwardly along said line of Clay street, one hundred and thirty-seven and a half feet, (137½;) thence southwardly parallel to said line of Leavenworth street one hundred and thirty-seven and a half feet, (137½;) thence eastwardly parallel to said line of Clay street one hundred and thirty-seven and a half feet, (137½;) to said line of Leavenworth street; thence northwardly along said line of Leavenworth street one hundred and thirty seven and a half feet, (137½), to said point of commencement, said lot being number eleven hundred and eighty-eight, (1188,) of the fifty-vara survey of

188 said city, as numbered and represented on the official map or plan thereof, together with the improvement thereon situated. To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first (1st) day of April, one thousand eight hundred and sixty-two, (1862,) for and during the full term of twelve calender months thence next ensuing, and fully to be complete and ended, yielding and paying therefor unto the said party of the first part, his heirs, and assigns, during the said term thereby granted the monthly rent or sum of six dollars, payable in advance at the office of James B. Townsend, esq., in said city and county of San Francisco, on the first day of each and every month during said term; provided always, nevertheless, that if the rent above reserved, or any part thereof, shall be behind or unpaid on any day of

payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants therein contained on the part or behalf of said part of the second part, his executors, administrators, and assigns, to be paid, kept, and performed, then and from thenceforth, it shall and may be lawful for the said party of the first part, his heirs, or assigns,
189 unto and upon the said demised premises, and every part thereof, wholly to re-enter and the same to have again, repossess, and enjoy as in his first and former estate, anything thereinbefore contained to the contrary thereof in anywise notwithstanding. And the said party of the second part, for himself and his heirs, executors, and administrators, doth covenant and agree to and with said party of the first part, his heirs, and assigns, by these presents that the said party of the second part, executors, administrators, and assigns, shall and will during the time hereby granted well and truly pay, or cause to be paid, unto the said party of the first part, his heirs or assigns, the said above-reserved rent, on the days and in the manner limited and prescribed as aforesaid for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents, and on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators, and assigns shall and will peaceably and quietly leave, surrender, and yield up unto the said party of the first part, his heirs or assigns, all and singular the said determined premises, reasonable
190 use and wear thereof and damage by elements excepted. And the said party of the first part, for himself and his heirs and assigns, doth hereby covenant and agree that the said party of the second part, his executors, administrators, and assigns, paying the above-reserved rent, and performing the covenants and agreements aforesaid, the said party of the second part, his executors, administrators, and assigns, shall and may at all times, during the said term hereby granted, peaceably and quietly have, hold, and enjoy the said demised premises, without any manner of let, suit, trouble, or hindrance of or from the said party of the first party of the first part, his heirs or assigns. And the said party of the second part agrees not to suffer or commit any waste of said demised premises, nor any nuisance thereon, and not to sub-let, assign, transfer, or in any manner part with the term hereby created, nor the possession of said premises, nor of any part thereof, nor any interest in either, without the written consent of the said party of the first part obtained.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

JAMES E. MUNFORD, [SEAL.]
By JAMES B. TOWNSEND,
His attorney in fact.
J. P. POWELSON. [SEAL.]

191 Signed, sealed in the presence of—
H. W. CLARK.

D. B. Hughes recalled.

Said defendants then recalled the witness D. B. Hughes, who further testified as follows:

Whilst grading Leavenworth street on the line of this fifty-vara lot 1188, we dug up two or three pieces of sawed scantling posts, about 3 by 4 inches in size, that were sharpened at the end, and had been apparently driven into the ground. I am certain we dug up these two pieces of this description, and I think three.

Jasper F. Smith.

Said defendants then called, as a witness on their behalf, one Jasper F. Smith, who testified as follows:

I have resided in the city of San Francisco since June, 1850. I am a married man, and was so in 1853 and 1854. We owned several lots of ground then. My wife owned a lot on the northeast corner of Hyde and Sacramento streets, in said city, in the same block in which fifty-vara lot 1188 is situated. The first time I recollect seeing said lot 1188 was in February, 1854. There was at that time a fence around my wife's lot, composed of posts and rails, sawed stuff, about one and a half by three inches in size, pine. My wife contracted with H. E. Carlton to build her a
192 house on her lot on the northeast corner of Hyde and Sacramento streets, being fifty-vara lot number 1279. The house was to be completed on the first of June, 1854. It was a part of his contract to build a new picket fence around her lot. He built the house and fence. When he took down the old fence that was around my wife's lot, I gathered up the lumber which had composed it, and piled it upon the lot. Afterwards, in passing by fifty-vara lot number 1188, I thought I identified some of this lumber that had composed my wife's old fence on the fence which surrounded lot 1188. The lumber which had compossd my wife's old fence, and which I then saw on the fence on lot 1188, was of a peculiar kind. It was of uniform width, and very long, 20 feet long, different from other lumber around there. The lumber in the fence around lot 1188, at the time last referred to, was all old lumber, and was of two different kinds, and I thought I recognized on it some of the strips which had composed my wife's old fence. This was in May, 1854, the latter part of May, that I saw these strips of my wife's lumber on the fence around lot number 1188. I had told Carlton some time before that not to use, nor allow any of his men to use any of the lumber of my wife's old fence, as I intended to use it in building a stable. I had discovered that he was using some
193 of it on the house when my wife had paid him for all the materials which were to go into it, and which were to have been new lumber. He said that I had better take the lumber of the old fence away, then; that it was not worth a chew of tobacco any how, and that I could not use it. To the best of my recollection, the fence around lot 1188 in May, 1854, when I thought I saw some of my wife's lumber on it, was composed of two strips on the sides of the posts, exclusive of the caps on the top—that is, of three strips, including the cap. It appeared to be all old lumber; I could not say exactly how old. That fence looked as if newly repaired. I think that at that time there was a picket fence enclosing Mr. Hayne's lot on the west side of 1188, and also some fence on the south side.

In February, 1854, when I had an idea of buying, I looked all over the lots in the vicinity. I first tried to buy a lot of Mr. Broderick; then from Mr. Wild. During my looking around I went on side of lot 1188; at that time there was a picket fence on the west side of it, and a fence on the south side of it, and a fence, or the remains of a fence, on the Clay and Leavenworth streets sides. There were posts and rails of a fence remaining there. When I saw it subsequently in May, 1854, and though I discovered my wife's
194 lumber upon it, the fence was different; it had been repaired on those two sides, and there seemed to be two different kinds of lumber on it, different kinds of strips, one wider than the other. Mr. Carlton and I had a conversation about this lot 1188 before the time I saw my wife's lumber upon it.

Defendants then offered to prove by this witness that prior to May, 1854, and before said witness saw his wife's lumber on the fence of said lot 1188,

the said Carlton proposed to witness to join him in jumping and squatting upon said lot, to the giving of which evidence said plaintiff objected, and the court sustained said objection, and excluded said evidence from the jury, to which ruling said defendants then and there excepted.

Said witness then continued: After I saw the fence repaired on lot 1188, I asked Carlton who had done it; he said he had.

Cross-examined.

On cross-examination said witness testified as follows:

The first time I went on this lot 1188 was, I think, in February, 1854; it might have been a little earlier or a little later. I saw posts of a fence then standing on the Clay street side of this lot. The posts were set not far apart. There were strips on them extending from one to the other; can't say that there were more than two strips. The posts might have been some
195 ten feet apart. This is what I saw on Clay street. I saw also on the Leavenworth street side of said lot posts, and two or three strips on them; I cannot tell how many there were; I could not say that there were more than two strips on the posts on that side. There were many bushes on this lot, but not so many on Clay street. The strips that I saw on this fence in May, 1854, and which I thought were my wife's lumber, were, I should think, half a dozen in number, and each about 20 feet in length. They extended from the corner of Leavenworth and Clay streets down. They looked like the lumber which had been on my wife's fence. I judged from their length and width. I felt vexed about it, but did not wish to have any difficulty with Carlton, and consequently did not mention to him my seeing my wife's lumber on that fence. The lumber on that fence was all old lumber, except perhaps a few of the posts. I remember that fact, because after I saw my wife's lumber there I looked all along the fence. It looked like lumber that had been exposed to the weather.

Leonard R. Hodgkins.

Said defendants then called, as a witness on their behalf, one Leonard R. Hodgkins, who testified as follows:

I have resided in San Francisco since 1849, with the exception of
196 one year that I was in the States. I know fifty-vara lot number 1188. In 1854 I lived on the corner of Pacific and Hyde streets. I first saw fifty-vara lot 1188 in January or February, 1855. I had a contract with property owners on Leavenworth street to grade said Leavenworth street from Pacific to Bush street, including the street in front of this lot 1188. It was a private contract, made with one Wilson, with the property-holders, and which I bought from him. About two thirds of the property-holders on Leavenworth street had signed it. I had conversation with H. E. Carlton at that time about this fifty-vara lot 1188. I enquired of him who the lot belonged to. He said it belonged to the "Fund Commissioners." He had signed the said contract for the grading of said street in front of the lot to the south of 1188, and on which his house stood. He never signed it for the grading of said street in front of this fifty-vara lot 1188. He never paid for the grading which he signed for, and which I did for him under said contract. At that time there was a fence on fifty-vara lot number 1188, made of posts and rails, posts about three inches by four, with a rail on the top, and I think another one on the side. I noticed this fence particularly on Leavenworth street side of this lot, and often sat on it whilst grading there. I did not notice it so particularly on Clay street side. I think there was a fence
197 on the Clay street side of the lot, but don't remember the description of fence which was on that side. This was when I first commenced

grading on Leavenworth street in January or February, 1855. At that time, January and February, 1855, there was no house of any kind on this lot 1188, neither on the Leavenworth street side nor on the Clay street side, from Clay street down to the lot on which Carlton's house stood. After I had been grading on Leavenworth some five or six months Mr. Carlton put up a house on this lot 1188, on the Leavenworth street front of it. He occupied that house afterwards as a carpenter shop. It stood about ten or twelve feet back from Leavenworth street. I had been grading when that house was put up five or six months. It was about August, 1855, when I saw that house put up by Carlton. I was some nine or ten months in grading that street; that is until the latter part of 1855. I passed lot 1188 during this time nearly every day. The first place where I first commenced grading was between Sacramento and Clay streets, as I wanted the sand from there to fill up other places. The first time I saw a house on lot 1188 was some five or six months after I commenced said grading. Carlton told me at several different times that said lot 1188 belonged to the "Fund Commissioners." He told me so in January, 1855, when I went around to
198 ascertain if the signatures to the contract for grading said street was genuine. He told me the same thing at the time he put the house up on this lot.

Cross-examined.

On cross-examination said witness testified:

Mr. Carlton did not say who had possession of lot 1188, or to whom the possession of said lot belonged, I never noticed said lot until 1855. I saw no house on it in February, 1855. It might have been in either July or August, 1855, that Carlton built the house upon said lot. I mean to say that I am sure that there was no building on the front of lot 1188 in February, 1855. I had a special reason for noticing the condition of said lot in that respect, and my attention was specially called to it, for I had it under consideration to take possession of said lot 1188 myself, if I could find no owner to it. I had not quite made up my mind to take possession of said lot when I saw Carlton putting a house upon it. I am as certain of the fact that there was no house on that lot in February, 1855, as I am of any other fact that I have stated. I am certain that Carlton built that shop in July or August, 1855. I saw him build it. I told Mr. Townsend what I knew about this lot about three weeks ago. It was the first time I ever saw him to know him.

199 Thereupon said defendants rested.

Henry E. Carlton recalled for plaintiff.

Said plaintiff then recalled his witness, the said Henry E. Carlton, who testified as follows:

I did not build my house on this lot 1188, in June, or July, or August, 1855. I never built but one building on that lot, and that was built on the 21st day of May, 1854. I never told the witness Hodgkins or anybody else that that lot belonged to the "Fund Commissioners." The whole of the fence which I put upon that lot was out of new lumber, which I bought. I put no other fence on those two streets. I saw the witness Lachman on the stand, and heard his testimony in regard to a fence on the Leavenworth street side of this lot in 1853. There was no such fence there in 1853.

Re-cross-exam'd.

On further cross-examination witness stated:

I never repaired any fence around lot 1188 before the fence which I put up there. There was no fence there to repair.

Thereupon said plaintiff likewise rested. And the foregoing was all the evidence which was given or offered upon said trial.

200 Thereupon said defendants moved the court to strike out all evidence which had been given of any acts of ownership or possession exercised over the east half of said fifty-vara lot number 1183 subsequent to the date of the first deed given in evidence by said plaintiff, to wit, July 25th, 1854, on the ground that the claim to the west half of said lot has been severed from that of the east half thereof since that date, and that therefor all such evidence in regard to said east half is irrelevant; but the court denied said motion. To which ruling said defendants then and there excepted.

Whereupon the counsel for said respective parties submitted to the court the instructions which they respectively desired the court to give to the jury, and then proceeded to argue said cause to the jury, upon the conclusion of which argument the court, of its own motion, charged the jury as follows, to wit:

The court's charge to the jury.

GENTLEMEN OF THE JURY: I regret the necessity of burdening your memory with so long a charge as I feel called upon to give, but the number and peculiarity of the questions you may be called upon to investigate seems to require it.

201 This is an action to recover possession of the west half of a fifty-vara lot, No. 1188.

If the defendants, or either of them, were in possession of the premises in question at the time of the commencement of this suit, they are presumed *prima facie* to have been rightfully there, and the burden of showing a better right to the premises rests on the plaintiff.

The plaintiff in this action relies:

1st. Upon a title claimed to have originated in an actual possession by his grantors before and on the 1st day of January, 1855, and continuing down to June 20th, 1855, the date of the passage by the common council of the ordinance of the city of San Francisco, commonly called the "Van Ness ordinance," and ripening into a perfect title under the provisions of that ordinance and the statute of California ratifying it.

2d. Upon a peaceable exclusive and adverse possession of the premises in question, for a period of five years next proceeding the alleged entry of the defendant.

3d. Upon prior possession merely, without reference to the "Van Ness ordinance" or to a five-years adverse possession. I will first direct your attention to the claim of title under the "Van Ness ordinance."

202 By this ordinance the city of San Francisco, with certain specified exceptions, relinquished and granted all the right and claim of the city to the lands within her corporate limits, as designated by the charter of 1851, to the parties in actual possession thereof, by themselves or tenants, on or before the 1st day of January, 1855, and to their heirs and assigns forever, provided that such possession was continued up to the time of the introduction of the ordinance into the common council, or, if such possession was interrupted by an intruder or trespasser, had been or might be recovered by legal process.

You are to determine from the testimony, under the instructions of the court as to the law governing the case, whether either of the parties, plaintiff's or defendants, is entitled to the benefit of this ordinance, and if so, which one.

Defendants claim that their grantor, Parker, had the first possession in the

summer of 1853, and as this claim is prior in point of time, it will be proper to consider it first.

To entitle defendants to the benefit of this ordinance, they must show by testimony, to your satisfaction, that their grantor, Parker, was in the actual possession of the premises in question, by himself or his tenant, on or before the 1st day of January, 1855, and that such possession was con-
203 tinued down to the date of the introduction of said ordinance into the common council, or, if interruped by an intruder or tresspasser, had been or might be recovered by legal process.

The actual possession contemplated by the ordinance, and which under its provisions vest the possessor with the title to the property, as defined by our supreme court, is that possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant, to the exclusion of others, and this possession must be evidenced by occupation or cultivation or other appropriate use, according to the locality and character of the particular premises. An enclosure by an ordinary fence of the premises, without residence thereon or improvement or cultivation, or other acts of ownership, is of itself insufficient. An enclosure of this character is by itself only the declaration of an intention to appropriate and possess the premises ; it does not, unaccompanied with any other acts, constitute the actual possession which the ordinance contemplates. To make an enclosure available under the ordinance it should be followed by some appropriate and continued use of the premises. The use may be any
204 of the various kinds to which land may be appropriated, and may be by the party himself or by his tenants.

If you find from the evidence that Parker had such a possession of the premises in question as is contemplated by the ordinance, as before defined, then he acquired the title of the city to the property, and could transmit that title to the defendants by proper conveyance.

But if he did not have such a possession, or if having once acquired such possession, he abandoned it at any time before the time limited in said ordinance had expired, he acquired no rights under the ordinance, and he could not transmit any such rights to the defendants, or either of them, by conveyance.

If you find that Parker acquired the title of the city under the ordinance referred to, the same title could not have been acquired in the same manner by the plaintiff or his grantors, and it will be unnecessary to inquire further.

But if you find that Parker did not so acquire the title, you will next inquire whether the plaintiff or his grantors acquired a title under the said ordinance.

In determining this question you will be governed by the same rules as to the character and evidence of possession as before stated to you.

If the jury find that said premises are within the limits of the
205 city, as defined by the charter of 1851, and there is no evidence of any other grant, or that it comes within any of the exceptions and reservations mentioned in the ordinance, and if they are further satisfied from the evidence that the plaintiff or his grantors, or either of them, was in the actual possession of the premises in question, as before defined, on the first day of January, 1855, and were not themselves intruders or trespassers from whom the possession might be recovered by parties other than the city, and that such possession was continued down to June 20th, 1855, the said party so in actual possession by virtue thereof, and of the said ordinance, and the statute of California ratifying and confirming it, acquired and he became vested with the title of the city, and became owner of the premises.

(To the giving of the last-recited portion of said charge, commencing with the words "If the jury find," said defendants then and there excepted.)

If you find that the said plaintiff or his grantors, or either of them, acquired the title of the city to and became the owner of said premises, under and by virtue of the provisions of said ordinance and statute ratifying and confirming the same, within the principles before stated, and that
206 the defendants subsequently entered upon said premises and ousted the plaintiff, as alleged in the complaint, the plaintiff is entitled to recover, and you will find for the plaintiff without inquiring further.

(To the giving of the last-recited portion of said charge, commencing with the words "If you find," said defendants then and there excepted.)

If you find against a title in either the plaintiff or defendant on this ground, it will be necessary for you to consider the next ground upon which plaintiff relies, viz: an adverse possession of five years.

If the jury find from the evidence that the plaintiff and his grantors, for the full period of five years next before the entry of the defendants, had been and then were in the peaceable, exclusive, and adverse possession of the premises in question, and that the defendants, without having any title in themselves other than a mere naked possession anterior to the commencement of such adverse possession of the plaintiff, entered and ousted the plaintiff from said premises, they will find for the plaintiff.

(To the giving of the last-*resided* portion of said charge, commencing with the words "If you find against a title," said defendants then and there excepted.)

207 As to what constitutes adverse possession the following is substantially taken from the statute:

If the jury find from the evidence that the plaintiff and those under whom he claims entered into the possession of the premises in question of a claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, and there has been a continued occupation and possession of the premises included in the instrument under such claim for five years, the premises so included shall be deemed to have been held adversely.

For the purpose of constituting an adverse possession by any person claiming a title founded on a written instrument, land shall be deemed to have been possessed and occupied—

1st. When it has been usually cultivated and improved.

2d. When it has been used for a supply of fuel or fencing timber, for the purposes of husbandry, or for the use of pasturage, or for the ordinary uses of occupant.

3d. When it has been protected by a substantial enclosure.

(To the giving of the last-recited portion of said charge, commencing with the words "As to what constitutes," said defendants then and there excepted.

208 If you find for the plaintiff in either or both of the issues already discussed, it will not be necessary for you to inquire further. But if you find against the plaintiff on all these questions, and also against any title in the defendants under the "Van Ness ordinance," it will become necessary for you to consider the question of prior possession merely, without reference to the "Van Ness ordinance" or to five years' adverse possession claimed by plaintiff.

(To the giving of the last-recited portion of said charge, commencing with the words "If you find for the plaintiff," the defendants then and there excepted.)

Prior possession is *prima facie* evidence of title, and proof of a prior possession not abandoned is sufficient to enable a party to recover. The

first possession, as between parties claiming by possession only, is the best, but rights acquired by possession merely may be lost by abandonment.

Abandonment constitutes in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it. If a party leaves land to which he has no title but possession, with the intent not to return and reoccupy it, or if, after having left it with the intention of returning, he renounces that
209 intention, this would be an abandonment. But the mere going out for a temporary purpose, with an intention of returning and reoccupying when that purpose is accomplished, would not of itself be an abandonment.

(To the giving of the last-recited portion of said charge, commencing with the words "Abandonment consists in," said defendants then and there excepted.)

An abandonment determines the right of the party from the moment of the act and the property, as to him, is thenceforth as though he had never owned or occupied it. It is then subject to be taken and occupied by others, and the party so abandoning has no more right to enter upon a possession acquired subsequent to the abandonment than any other stranger. Abandonment may be inferred from the acts of the parties, and the inference of abandonment may arise from a single act, or from a series of acts continued through a long space of time. It is a fact to be determined from the particular circumstances of the case.

In examining the question of abandonment the jury is entitled to take into consideration any acts of the parties claiming the premises, proved to their satisfaction, such for example, as keeping fences in repair, paying taxes, and street assessments, occupation, keeping cattle upon the
210 land, or any appropriate use of the premises by the claimant himself, or his tenants, and any other acts of ownership manifesting an intent in good faith to keep up and preserve any right of possession he may have acquired.

(In the giving of the last-recited portion of said charge, commencing with the words "In examining the question of abandonment," said defendants then and there excepted.)

So, also, on the other hand, any acts or omissions that indicate a contrary purpose, if it satisfactorily appears from the evidence that the party ceased to occupy the premises, allowed fences to decay and disappear, neglect for a long period of time to exercise any acts of ownership obvious to the senses of others, or knowingly allowed other parties in ignorance of his claim to enter upon the premises, fence them in, make valuable improvements, possess and occupy them for a series of years, without protesting against such acts, or notifying such parties of his own claim, or in any manner asserting his rights; and finally, after a lapse of seven or eight years conveyed to other parties for a nominal consideration; the facts, and facts like these, or such of them as are found by the jury to exist, are material elements, and circumstances which the jury is entitled to consider in determining the question of abandonment.

211 (To the giving of the last-recited portion of said charge, commencing with the words "So also, on the other hand," said defendants then and there excepted.)

But whether such facts exist, and the weight to be given them, singly or in the aggregate, are questions for the jury alone to decide.

If you find that this case must be determined upon the question of naked prior possession without any reference to any title acquired under the "Van Ness ordinance," or to the question of five years adverse possession claimed by the plaintiff, before explained to you by the court, and if you are

satisfied from the evidence that the plaintiff and his grantors were in the actual possession of the premises, and did not abandon them, and that the possession of the plaintiff and his grantors was the first possession by any of the parties to this suit or their grantors, which was not abandoned, and that the defendant entered upon said premises and ousted the plaintiff therefrom, you will find for the plaintiff; otherwise, for the defendants.

As to the defendant Townsend, if the jury believe from the evidence that Townsend purchased the house which was moved on the lot wholly or in part for his own benefit, and built or caused to be built, for his
212 own use and benefit, the fence mentioned by the witness as having been erected on two sides of the lot in April last, and that the persons who placed said house and fence upon and around the lot were his servants and employees, and they and the said house and lot were under the direction and control of Townsend, and that said house and fence were so placed upon the lot to enable Townsend to obtain and hold possession of the lot for the benefit of himself solely or in part, then such acts were the acts of Townsend, and any entry effected or possession acquired thereby were his entry and possession."

(To the giving of the last-recited portion of said charge, commencing with the words "As to the defendant Townsend," said defendants, and each of them, then and there excepted.)

And if the jury find from the evidence that defendant Townsend did enter and take possession of the premises a short time prior to the commencement of this suit, they will be justified in finding that the possession continued till the commencement of the suit, unless there is evidence showing that his possession ceased.

(To the giving of the last-recited portion of said charge, commencing with the words "And if the jury find," said defendants, and each of them, then and there excepted.)

213 But if the jury find from the evidence that Townsend was not in the possession of the premises at the time of the commencement of this suit, they will find for the defendant Townsend.

You are to determine the issues from the evidence before you; you are the sole judges of the credibility of the witnesses, of the weight and effect of the testimony, and of the facts in the case.

And the court then and there gave to the jury, at the request and upon the prayer of said plaintiff, the following further instructions, to wit:

1st. The owner of real estate, holding by a valid title, need not fence nor improve it for the purpose of retaining the ownership, and without fencing or improving the same he may recover the premises against any persons who enter upon it, unless such persons have entered into the same, and occupied it and held it, adversely for the term of five years.

To the giving of which instruction said defendants then and there excepted.

2nd. That the doctrine of abandonment only applies where there has been a mere naked possession without title. Where there is a title there would be no continuance of possession to preserve that title. That
214 the owner of real estate may fence it or lease it unfenced; and his rights by virtue of the title remain the same until five years of adverse possession deprives him of it—those rights."

To the giving of which instruction said defendants then and there excepted.

3rd. That if the jury find that on the first day of January, 1855, and from that time, continually, down to the twentieth day of June, 1855, said possession of the premises was in the plaintiff, or those under whom he

claims, *as was contemplated by the Van Ness ordinance in granting lots* to the possessors thereof, and that the premises are within the operation of the provisions of said ordinance, then they should find for the plaintiff, whether the fence around the premises has been casually out of repair or not since June 20, 1855.

To the giving of which instructions said defendants then and there excepted.

And the court then and there refused to give the jury the following instruction, which had been previously submitted to the court, as before stated, and was asked by said defendants, to wit:

1st. The actual possession of the lot in dispute by the defendant Powelson at the time of the commencement of this action is *prima facie*
215 evidence that the legal right to the possession of said lot was then in him.

To which refusal said defendants then and there excepted.

And the court then and there refused to give to the jury the following other instruction, which has been likewise previously submitted to the court, as before stated, and was asked by said defendants, to wit:

2d. The evidence given on this trial is not sufficient in law to entitle the plaintiff to recover in this action.

To which refusal said defendants then and there excepted.

And the court then and there refused to give to the jury the following other instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

3d. The evidence which had been given by the plaintiff upon this trial is not sufficient to show a relinquishment and grant to him, or to any one under whom he has deraigned title, of the right and claim of the city of San Francisco to the lot in dispute in this action, under the provisions of the ordinance of said city recited in the act of the legislature of California passed March 11, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common
216 council of said city," and the provisions of said legislative act.

To which refusal said defendants then and there excepted.

And the court then and there likewise refused to give to the jury the following other instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

4th. The plaintiff, George G. Greely, has not shown such an actual possession of the lot in dispute in this action, by himself or by any one from whom he has deraigned title, as is required to establish a relinquishment and grant of the right and claim of the city of San Francisco to the lot in dispute in this action to him or to any one from whom he has deraigned title under the provisions of the ordinance of said city recited in the act of the legislature of California, purchased March 11, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," and the provisions of said legislative act.

To which refusal said defendants then and there excepted.

And the court then and there refused to give the jury the following other instruction, which had been in like manner previously submitted to
217 said court, and was asked by said defendants, to wit:

5th. If the jury find from the evidence that before S. B. Conrey or H. E. Carlton entered upon fifty-vara lot No. 1188, one James W. Parker had entered thereupon, and had enclosed said lot with a fence and claimed the possession thereof at the time of said Conrey's or Carlton's entry thereon, and that such claim and possession of said Parker were visibly evidenced by the existence of such enclosure, or parts thereof, still remaining

upon said lot, then such entry thereon by the said Conrey or Carlton was wrongful as against the said Parker, and the said Parker, or the assignee of his right in and to said lot, might lawfully re-enter thereon and resume the possession thereof when he could do so without a breach of the public peace.

To which refusal the defendants then and there excepted.

And the court then and there further refused to give to the jury the following other instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

6th. Proof of mere actual possession of land at any particular time raises in favor of such possessor only the presumption that his possession is a rightful one, and this presumption continues only so long as such actual possession continues, and ceases when such actual possession ceases. It is only when such possessor claims some title, estate, or interest in the land so possessed that his possession becomes evidence that he holds the title, estate, or interest which he claims to hold.

218

To which refusal said defendants then and there excepted.

And said court then and there likewise refused to give to the jury the following other instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

7th. If, therefore, the jury believe from the evidence that, prior to the execution and delivery of the deed from Henry E. Carlton to the plaintiff, (given in evidence,) and whilst said Carlton was holding possession of the premises now in dispute, to wit, the western half of fifty-vara lot No. 1188, he, the said Carlton, disclaimed being the owner of said lot, declaring that the same "belonged to the fund commissioners," then such possession by the said Carlton was not evidence of an estate in fee simple in said land, nor of any estate, title, or interest therein which will enable said plaintiff, (his grantees,) if not in the actual possession of said premises at the time of said Powelson's entry, to recover in the present action.

To which refusal said defendants then and there excepted.

219

And the court then and there likewise refused to give to the jury the following instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

8th. If the jury further believe from the evidence that said plaintiff has not acquired, nor ever claimed to possess, any greater or other right or title in or to said premises than that previously held by the said Carlton and transferred to said plaintiff by said Carlton's deed, (given in evidence,) and that the said plaintiff had not the actual possession of said premises at the time of defendant Powelson's entry thereon, then neither the possession of the said Carlton nor that of said plaintiff, if any, can enable said plaintiff to recover in this action.

To which refusal said defendants then and there excepted.

And said court then and there likewise refused to give to the jury the following instruction, which had been in like manner previously submitted to the court, and was asked by said defendants, to wit:

9th. The said plaintiff, having shown no title in himself to the premises in dispute, cannot recover the same in this action without having shown that he was in the actual possession thereof at the time of defendant's entry, and was actually ousted by such entry.

220

To which refusal said defendants then and there excepted.

And the court then and there likewise refused to give to the jury the following instruction, which had been in like manner previously submitted to the court, and asked by said defendants, to wit:

10th. To constitute actual possession of said premises at the time of such entry, said plaintiff must have been then in the actual bona fide occu-

pation or enjoyment thereof, residing thereon, cultivating the same, or devoting the same to some real and substantial use or purpose, according to the locality and character of said premises, and actually subjecting the same to his will and control, to the exclusion of all others.

To which refusal said defendants then and there excepted.

And the court then and there likewise refused to give to the jury the following instruction, in like manner previously submitted to the court and asked by said defendants, to wit:

11th. That the mere employment of an agent or agents to look after said premises, the payment of taxes and assessments thereon, and the exercise of casual acts of ownership over the same by said plaintiff, or by his agents, whilst said premises remained unenclosed by a substantial fence, and
221 not otherwise possessed, used, or enjoyed, was insufficient to constitute such actual possession.

To which refusal said defendants then and there excepted.

And the court then and there likewise refused to give to said jury the following other instruction, in like manner previously submitted to the court, asked by said defendants, to wit:

12th That the evidence given on this trial does not show an actual possession by the plaintiff of the premises in dispute at the time of the entry thereon by either of said defendants.

To which refusal said defendants then and there excepted.

And the court then and there likewise refused to give to the jury the following other instruction, in like manner previously submitted to the court, and asked by said defendants, to wit:

13th. There is no evidence before the jury of any entry upon said premises by said defendant Townsend, nor of any ouster or detention of said premises from said plaintiff by him; the jury will therefore find a verdict in his favor.

To which refusal said defendants, and each of them, then and there excepted.

222 And the court then and there likewise refused to give to the jury the following instructions, in like manner previously submitted to the court, and asked by said defendants, to wit:

14th. If the jury believe from the evidence that the premises sued for in this action were, at the time of the commencement of said action, to wit, on the 8th day of April, A. D. 1862, actually and solely occupied by the defendant Powelson, and that the defendant Townsend was not then in the actual occupation of said premises, nor of any part thereof, then the said Townsend is entitled to a verdict in his favor.

But the court gave said last-mentioned instruction altered and changed as follows, to wit:

If the jury believe from the evidence that the premises sued for in this action were at the time of the commencement of said action, to wit, on the 8th day of April, A. D. 1862, actually and solely occupied and possessed by the defendant Powelson, and that the defendant Townsend was not then in actual occupation or possession of said premises, nor of any part thereof, then said Townsend is entitled to a verdict in his favor.

To which refusal of the court to give instruction as asked said defendants, and each of them, then and there excepted.

223 Thereupon the jury rendered their verdict for said plaintiff and against both of said defendants.

The foregoing statement has been allowed by me and is correct.

LORENZO SAWYER,
Judge 12th Judicial District.

San Francisco, March 23d, 1863.

Endorsed: Engrossed statement of new trial, filed March 25th, 1863.
W. BARTLETT, *Clerk,*
By WM. R. SATTERLEE, *Deputy Clerk.*

Order submitting m. for new trial.

224 In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, March term, A. D. 1863.

Present: Hon. Lorenzo Sawyer, judge.

GEORGE G. GREELY
vs.
JAMES B. TOWNSEND *et al.*

MONDAY, *March 30th, A. D.* 1863.

On motion and by consent of the counsel of the respective parties hereto, in open court, the motion for a new trial herein was submitted to the court for consideration and decision, briefs to be filed within five days to each party.

225 In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, March term, A. D. 1863.

Present: Hon. Lorenzo Sawyer, judge.

GEORGE G. GREELY
vs.
JAMES B. TOWNSEND *et al.*

SATURDAY, *April 25th, A. D.* 1863.

In this cause, which was heretofore submitted to the court for consideration and decision, on motion for a new trial herein, it is ordered that said motion be, and it is hereby, denied, proceedings stayed for twenty days, and defendants are allowed that time to perfect an appeal.

226 In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco.

GEORGE G. GREELY, pl'ff,
vs.
JAMES B. TOWNSEND AND JOHN P. POWELSON, def'ts.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this state from the judgment herein entered and recorded in the said district court, on the (29th) twenty-ninth day of November, A. D. 1863, in favor of said plaintiff against said defendants, and from the whole thereof; and also appeal from the order of said district court, made and entered therein on the 25th day of April, A. D. 1863, denying said defendants' motion for a new trial.

Dated at San Francisco this 6th day of May, A. D. 1863.

Yours, &c.,

JAS. B. TOWNSEND, *in pro per., and as attorney for appellant Powelson.*

To the CLERK *of said district court.*
Messrs. BURBANK & HUBBARD,
Attorneys for plaintiff and respondent.

227 Endorsed: Take notice that the within is a copy of a notice of

appeal duly filed this day in the above-entitled cause in the office of the clerk of said district court.

Dated this sixth day of May, A. D. 1863.

Yours, &c,

JAS. B. TOWNSEND,
Attorney for appellants.

To BURBANK & HUBBARD,
Attorneys for respondent.

Endorsed: We acknowledge due service of the within and foregoing notice of appeal, and notice of filing this 6th day of May, A. D. 1863.

BURBANK & HUBBARD.

Endorsed: Filed May 6th, 1863.

W. BARTLETT, *Clk,*
Per WM. R. SATTERLEE, *D. C.*

228 In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco.

GEORGE G. GREELY
vs.
JAMES B. TOWNSEND *et als.*

[Five cent revenue stamp.]

I, Wm. Loewy, county clerk of the city and county of San Francisco, and ex officio clerk of the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, do hereby certify that the foregoing are full, true, and correct copies of original papers on file in my office, and of original orders entered on the minutes of said court in the above-entitled cause. That the same constitute the transcript on the appeal of said defendants to the supreme court of the State of California, from the judgment herein entered and recorded in the said district court on the 29th day of November, A. D. 1862, in favor of said plaintiff against said defendants, and from the whole thereof; and, also, appeal from the order of said district court, made and entered therein on the 25th day of April, A. D. 1863, denying said defendants' motion for a new trial. And I further certify that the undertaking on appeal required by law has been duly filed.

In witness whereof, I have hereunto set my hand and affixed [SEAL.] the seal of said district court this 21st day September, A. D. 1863.

WM. LOEWY, *Clerk,*
Per G. C. LETCHER, *Deputy Clerk.*

229 In the supreme court of California.

GEORGE G. GREELY, pl'ff and resp't,
vs.
JAMES B. TOWNSEND AND JOHN P. POWELSON,
def'ts and ap'ts.

And now come the said appellants and say that there is manifest error in the record and proceedings in the above-entitled action, and they assign the following errors apparent upon the face of said record, to wit:

1st. The court below erred in ruling that the questions put by plaintiff's counsel to the defendant Townsend, when called upon the stand as a witness for said plaintiff, and asked whether he "purchased the property in question for Mr. Munford," and whether "he purchased said property for himself" were competent, inasmuch as said questions and the matters thereby brought

before the jury were wholly immaterial and irrelevant to the merits of this action ; and said questions were put and said matters sought only for the purpose of misdirecting the minds of the jury from the true merits of said action to a collateral and wholly immaterial matter, whereby said defendants were greatly prejudiced.—(See page 70 of transcript.)

230 2nd. The court below erred in ruling that the testimony of plaintiff's witness George Y. Loring, as to his paying taxes and street assessments upon said lot for said plaintiff, was competent to go to the jury "to show possession ;" and in admitting said testimony for that purpose.—(See page 78 of transcript.)

3rd. The court below erred in denying said defendants' motion, made after the close of said plaintiff's case, to strike out the deeds which had been given in evidence by said plaintiff.—(See page 116 of transcript.)

4th. The court below erred in denying said defendants' motion to nonsuit said plaintiff as to both of said defendants.—(See page 116 of transcript.)

5th. The court below erred in denying said defendant's motion to nonsuit said plaintiff as to said defendant Townsend.—(See page 117 of transcript.)

6th. The court below erred in ruling out and excluding from the jury the evidence offered by said defendants of the final confirmation of said lot by the United States to the city of San Francisco, and of the deraignment of title thereto under said confirmation from said city of San Francisco to James E. Munford, under whose title defendants undertook and claimed the right to justify the taking possession of said lot.—(See pages 156 to 172 of transcript.)

231 7th. The court below erred in ruling out and excluding from the jury the evidence offered by said defendants of the final confirmation of said lot by the United States to the city of San Francisco, for the purpose of showing that the title thereto was not in said plaintiff, but if not acquired by said Munford, was outstanding in said city.—(See page 171 of transcript.

8th. The court below erred in ruling out and excluding from the jury the proof offered by said defendants, to be made by the witness Jasper F. Smith, that prior to May, 1854, H. E. Carlton, under whose possession said plaintiff claims, proposed to said witness "to join him in jumping and squatting upon said lot."—(See page 184 of transcript.)

9th. The court below erred in denying said defendants' motion to strike out all evidence which had been given of any acts of ownership or possession exercised over the east half of said fifty-vara lot No. 1188, subsequent of the date of the first deed given in evidence by said plaintiff, to wit: July 25, 1854.—(See page 190 of transcript.)

10th. The court below erred in charging the jury of its own motion as follows: "If the jury find that said premises are within the limits of the city, as defined by the charter of 1851, and there is no evidence of any other grant, or that it comes within any of the exceptions and re-

232 servations mentioned in the ordinance, and if they are further satisfied from the evidence that the plaintiff or his grantors, or either of them, was in the actual possession of the premises in question, as before defined, on the first day of January, 1855, and were not themselves intruders or trespassers from whom the possession might be recovered by parties other than the city, and that such possession was continued down to June 20th, 1855, the said party so in actual possession, by virtue thereof, and of the said ordinance and the statute of California ratifying and confirming it, acquired and became vested with the title of the city, and became the owner of the premises."—(See page 194 of transcript.)

10½th. The court below erred in charging the jury of its own motion as follows: "If you find that the said plaintiff or his grantors, or either of them,

acquired the title of the city to, and became the owner of, said premises under and by virtue of the provisions of said ordinances and statute, ratifying and confirming the same within the principles before stated, and that the defendants subsequently entered upon said premises and ousted the plaintiff, as alleged in the complaint, the plaintiff is entitled to recover, and you will find for the plaintiff, without enquiring further."—(See page 195 of transcript.)

233 11th. The court below erred in charging the jury of its own motion as follows: "If you find against a title in either the plaintiff or defendant, on this ground, it will be necessary for you to consider the next ground upon which plaintiff relies, viz: an adverse possession of five years. If the jury find from the evidence that the plaintiff and his grantors, for the full period of five years next before the entry of the defendants, had been and then were in the peaceable, exclusive, and adverse possession of the premises in question, and that the defendants, without having any title in themselves other than a mere marked possession, anterior to the commencement of such adverse possession of the plaintiff, entered and ousted the plaintiff from said premises, they will find for the plaintiff"—(See page 196 of transcript.)

12th. The court below erred in charging the jury of its own motion as follows: "As to what constitutes adverse possession the following is substantially taken from the statute: 'If the jury find from the evidence that the plaintiff, and those under whom he claims, entered into the possession of the premises in question under a claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, and there has been a continued occupa-

234 tion and possession of the included in the instrument under such claim for five years, the premises so included shall be deemed to have been held adversely. For the purpose of constituting an adverse possession by any person claiming a title, founded on a written instrument, land shall be deemed to have been possessed and occupied.'

"1. When it has been usually cultivated or improved.

"2. When it has been protected by substantial enclosure.

"3. When it has been used for a supply of fuel or of fencing timber, for the purposes of husbandary, or for the use of pasturage, or for the ordinary uses of the occupant."—(See page 197 of transcript.)

13th. The court below erred in charging the jury of its own motion as follows: "If you find for the plaintiff on either or both of the issues already discussed, it will not be necessary for you to inquire further. But if you find against the plaintiff on all these questions, and also against any title in the defendants under the Van Ness ordinance, it will become necessary for you to consider the question of prior possession merely, without reference to the Van Ness ordinance or to five years' adverse possession claimed by plaintiff."—(See page 198 of transcript.)

235 14th. The court below erred in charging the jury of its own moton as follows: "Abandonment consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it. If a party leaves land to which he has no title but possession, with the intent not to return and reoccupy it, or if, after having left it with the intention of returning, he renounces that intention, this would be abandonment. But the mere going out for a temporary purpose, with an intention of returning and reoccupying when that purpose is accomplished, would not of itself be an abandonment."—(See page 198 of transcript.)

15th. The court below erred in charging the jury of its own motion as follows: "In examining the question of abandonment the jury is entitled to take into consideration any acts of the parties claiming the premises, proved

to their satisfaction, such, for example, as keeping fences in repair, paying taxes and street assessments, occupation, keeping cattle upon the land, or any appropriate use of the premises by the claimant himself, or his tenants, and any other acts of ownership manifesting an intent in good faith to keep up and preserve any rights of possession he may have acquired."—(See page 199 of transcript.)

236 16th. The court below erred in charging the jury of its own motion as follows: "So also, on the other hand, acts or omissions that indicate a contrary purpose. If it satisfactorily appear from the evidence that the party ceased to occupy the premises, allowed the fences to decay and disappear, neglected for a long period of time to exercise any acts of ownership obvious to the senses of others, or knowingly allow other parties, in ignorance of his claim, to enter upon the premises, fence them in, make valuable improvements, possess and occupy them for a series of years without protesting against such acts, or notifying such parties of his own claim, or in any manner asserting his rights; and finally, after an elapse of seven or eight years, conveyed to other parties for a nominal consideration; these facts, and facts like these, or such of them as are found by the jury to exist, are material elements and circumstances which the jury is entitled to consider in determining the question of abandonment."—(See page 200 of transcript.)

17th. The court below erred in charging the jury of its own motion as follows: "As to the defendant Townsend, if the jury believe from the evidence that Townsend purchased the house that was moved on the lot, wholly or in part for his own benefit, and built, or caused to be built, for his own use and benefit, the fence mentioned by the witnesses as having been

237 erected on two sides of the lot in April last, and that the persons who placed said house and fence upon and around the lot were his servants and employees, and they, and the said house and lot were under the direction and control of Townsend, and that said house and fence were so placed upon the lot to enable Townsend to obtain and hold possession of the lot for the benefit of himself solely, or in part, then such acts were the acts of Townsend, and any entry or possession acquired thereby were his entry and possession."—(See page 201 of transcript.)

18th. The court below erred in charging the jury of its own motion as follows: "And if the jury find from the evidence that defendant Townsend did enter and take possession of the premises a short time prior to the commencement of the suit, they will be justified in finding that the possession continued till the commencement of the suit, unless there is evidence showing that his possession ceased."—(See page 203 of transcript.)

19th. The court below erred in giving to the jury, *at the request of said plaintiff*, the following instruction: "1st. The owner of real estate, holding by a valid title, need not fence or improve it for the purpose of re-

238 taining the ownership, and without fencing or improving the same he may recover the premises against any persons who entered upon it, unless such persons have entered into the same and occupied it and held it adversely for the term of five years."—(See page 203 of transcript.)

20th. The court below erred in giving to the jury, at the request of said plaintiff, the following instruction: "2d. That the doctrine of abandonment only applies where there has been a mere naked possession without title. Where there is title there need be no continuance of possession to preserve that title. That the owner of real estate may fence it, or leave it unfenced, and his rights by virtue of the title remain the same until five years of adverse possession deprives him of those rights."—(See page 203 of transcript.)

21st. The court below erred in giving to the jury, at the request of said plaintiff, the following instruction: "3. That if the jury find that, on the first day of January, 1855, and from that time continually down to the twentieth day of June, 1855, such possession of the premises was in the plaintiff, or those under whom he claims, as was contemplated by the Van Ness ordinance in granting lots to the possessors thereof, then they should find for the plaintiff, whether the fence around the premises has been casually out of repair or not, since June 20th, 1855."—(See page 204 of transcript.)

239 21½. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "1. The actual possession of the lot in dispute by the defendant Powelson at the time of the commencement of this action is *prima facie* evidence that the legal right to the possession of said lot was then in him."—(See page 204 of transcript.)

22nd. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "2. The evidence given on this trial is not sufficient in law to entitle the plaintiff to recover in this action."—(See page 205 of transcript.)

23d. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "3. The evidence which has been given by the plaintiff upon this trial is not sufficient to show a relinquishment and grant to him, or to any one under whom he has deraigned title, of the right and claim of the city of San Francisco to the lot in dispute in this action, under the provisions of the ordinances of said city recited in the act of the legislature of California, passed March 11th, 1855, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," and the provisions of said legislative act."—(See page 205 of transcript.")

240 24th. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "4. The plaintiff, George G. Greely, has not shown such an actual possession of the lot in dispute in this action by himself, or by any one from whom he has deraigned title, as is requisite to establish a relinquishment and grant of the right and claim of the city of San Francisco to the lot in dispute in this action to him or to any one from whom he has deraigned title, under the provisions of the ordinances of said city recited in the act of the legislature of California, passed March 11th, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," and the provisions of said legislative act."—(See page 206 of transcript.)

25th. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "5. If the jury find from the evidence that before S. B. Conrey or H. E. Carlton entered upon 50-vara lot No. 1188, one James W. Parker had entered thereupon, and had enclosed said lot with a fence, and claimed the possession thereof at the time of said Conrey's or Carlton's entry thereon, and that such claim and possession of said Parker were visibly evidenced by the existence of such enclo-

241 sure, or parts thereof, still remaining upon said lot, then such entry thereon by the said Conrey or Carlton, was wrongful as against the said Parker, and the said Parker, or the assignee of his right in and to said lot, might lawfully re-enter thereon and resume the possession thereof, when he could do so without a breach of the public peace."—(See page 207 of transcript.)

26th. The court below refused to give to the jury the following instruction asked by said defendants: "6. Proof of mere actual possession of land at any time raises in favor of such possessor only the presumption that his

possession is a rightful one, and this presumption continues only so long as such actual possession continues, and ceases when such actual possession ceases. It is only when such possessor claims some title, estate, or interest in the land so possessed that his possession becomes evidence that he holds the title, estate, or interest which he claims to hold."—(See page 207 of transcript.)

27th. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "7. If, therefore, the jury believe from the evidence that prior to the execution and delivery of the deed from Henry E. Carlton to the plaintiff, (given in evidence,) and whilst the said Carlton was holding possession of the premises now in dispute, to
242 wit: the western half of 50-vara lot No. 1188, he, the said Carlton, disclaimed being the owner of said lot, declaring that the same belonged to the "fund commissioners," then such possession by the said Carlton was not evidence of an estate in fee simple in said land, nor of any estate, title, or interest therein, which will enable said plaintiff, (his grantee,) if not in the actual possession of said premises at the time of said Powleson's entry, to recover in the present action."—(See page 208 of transcript.)

28th. The court below erred in refusing to give to the jury the following instructions asked by said defendants: "8. If the jury further believe from the evidence that said plaintiff has not acquired nor ever claimed to possess any greater or other right or title in or to said premises than that previously held by the said Carlton, and transferred to said plaintiff by said Carlton's deed, (given in evidence,) and that the said plaintiff had not the actual possession of said premises at the time of defendant Powelson's entry thereon, then neither the possession of the said Carlton nor that of said plaintiff (if any) can enable said plaintiff to recover in this action."—(See page 209 of transcript.)

29th. The court below erred in refusing to give to the jury the fol-
243 lowing instruction asked by said defendants:" "9th. The said plaintiff having shown no title in himself to the premises in dispute, cannot recover the same in this action without having shown that he was in the actual possession thereof at the time of defendant's entry, and was actually ousted by such entry."—(See page 209 of transcript.)

30th. The court below erred in refusingto give to the jury the following instruction asked by defendants: "10th. To constitute actual possession of said premises at the time of such entry said plaintiff must have been then in the actual bona fide occupation or enjoyment thereof, residing thereon, cultivating the same, or devoting the same to some real and substantial use or purpose, according to the locality and character of said premises, and actually subjecting the same to his will and control, to the exclusion of all others."—(See page 210 of transcript.)

31st. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "11th. That the mere employment of an agent or agents to look after said premises, the payment of taxes and assessments thereon, and the exercise of casual acts of ownership over the same by said plaintiff, or by his agents, whilst said premises remained unenclosed by a substantial fence, and not otherwise possessed, used, or en-
joyed, was insufficient to constitute such actual possession."—(See
244 page 210 of transcript.)

32d. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "12th. That the evidence given on this trial does not show an actual possession by the plaintiff of the premises in dispute at the time of the entry thereon by either of said defendants.—(See page 210 of transcript.)

33d. The court below erred in refusing to give to the jury the following

instruction asked by said defendants: "13th. There is no evidence before the jury of any entry upon said premises by said defendant Townsend, nor of any ouster or detention of said premises from said plaintiff by him. The jury will therefore find a verdict in his favor."—(See page 211)

34th. The court below erred in refusing to give to the jury the following instruction asked by said defendants: "14th. If the jury believe from the evidence that the premises sued for in this action were at the time of the commencement of said action, to wit, on the 8th day of April, A. D. 1862, actually and solely occupied by the defendant Powelson, and that the defendant Townsend was not then in actual possession of and occupation of said premises, nor of any part thereof, then said Townsend is entitled

245 to a verdict in his favor."—(See page 212 of transcript.)

35th. The court below erred in denying said defendants' motion for a new trial.—(See page 215 of transcript.)

And the said appellants pray that for the errors aforesaid, the said judgment, and the order of said court below denying their motion for a new trial, be reversed.

JAS. B. TOWNSEND,
In pro. per., and of counsel for Powelson, appellant.
JNO. VANARMAN,
Of counsel for appellants.

246 In the supreme court of the State of California. April term, A. D. 1864.

GEORGE G. GREELEY *vs.* JAMES B. TOWNSEND *et al.* } On appeal from the district court of the twelfth judicial district in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore argued, submitted, and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Sanderson, chief justice, full bench concurring, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, and adjudged, and decreed by the court here that the judgment of the district court of the twelfth judicial district in and for the city and county of San Francisco, in the above-entitled cause be, and the same is hereby, affirmed, with costs.

247 Supreme court of the State of California.

GEORGE G. GREELEY *vs.* JAMES B. TOWNSEND AND JOHN P. POWELSON.

I, William D. Harriman, clerk of the supreme court of the State of California, do hereby certify that the foregoing two hundred and thirty-six written pages, contain a full, true, and perfect transcript of the record and proceedings and judgment of said supreme court in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said supreme court of the State of California, at the city of Sacramento, this twenty-fifth day of July, A. D. 1864.

W. D. HARRIMAN,
Clerk of the supreme court of the State of California,
By. WM. G. WOOD, *D'y Clk.*

Filed December 8, 1864.

Supreme Court of the United States.

DECEMBER TERM, 1866.

J. B. TOWNSEND AND J. P. POWELSON, PLAINTIFFS IN ERROR,

vs.

GEORGE G. GREELEY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFFS IN ERROR.

This is an action of ejectment, brought on the 8th day of April, 1862, by Greeley, defendant in error, against Townsend and Powelson, plaintiffs in error, in the district court for the twelfth judicial district of the State of California, to recover the west half of fifty vara lot No. 1188, in the city of San Francisco.

Plaintiff and defendants below alike asserted title, under grant from the city of San Francisco, by the Van Ness ordinance of June 20, 1855, and the act of the Legislature of California of March 11, 1858, confirming said ordinance. By this ordinance (Stats. Cal., 1858, p. 52) the city of San Francisco, with certain specified exceptions, relinquished and granted all the right and claim of the city to the lands within her corporate limits, as designated by the charter of 1851, to the parties in actual possession thereof, by themselves or tenants, *on or before the 1st day of January*, 1855, and to their heirs and assigns forever; provided that such possession was continued up to the time of the introduction of

the ordinance into the common council, or, if such possession were interrupted by an intruder, had been or might be recovered by legal process. (See charge of court, Rec., p. 69.)

Plaintiff below introduced, on trial, evidence tending to show that "in 1853" one S. B. Conrey was in possession of said lot, and that it continued in the possession of him and his assigns until after the passage of the Van Ness ordinance. That, on the 20th May, 1854, Carlton, for Conrey, built a fence on the Clay and Leavenworth street sides of the lot, which, with the fences of the owners on the other two sides, enclosed it. And that at the same time, Carlton, for Conrey, built a cabin, eight by ten feet, on the lot, which stood there a year, and was occupied by Carlton as a carpenter shop, and was then removed. (Rec., p. 33.) Conveyances were given in evidence from Conrey to Woods, February, 1854; from Woods back to Conrey, January 2, 1855; from Conrey to Mrs. Hepsebeth Carlton, February 24, 1855; and from Henry E. Carlton, husband of Hepsebeth Carlton, to George G. Greeley, July 7, 1856. And proof tending to show that Greeley remained in constructive possession from date of last-mentioned conveyance to 2d April, 1862, the date of the alleged unlawful entry and ouster. (Rec., 17 to 42.)

Defendants below introduced in evidence a deed from C. Vogel to James W. Parker, dated July 14, 1853, for said lot; a power of attorney, from Parker to Williams, dated 28th April, 1854, to manage, rent, or sell said lot; a conveyance of said lot from Williams, by Parker, as attorney, to James E. Munford, dated 25th of February, 1862; (Rec., pp. 44 to 48;) a power of attorney from Munford to Townsend, (one of plaintiffs in error,) dated 25th October, 1859, authorizing him to manage, lease, or sell all his property in San Francisco, (Rec., p. 63,) and a lease for one year from Munford, by Townsend, his attorney, to Powelson, (the other plaintiff in error,) of said lot, dated 28th March, 1862. (Rec., p. 9.)

Defendants below also gave in evidence the testimony of Andrew Williams, (Record, p. 44,) tending to show that in August, 1853, when the lot was unenclosed, covered with brush, and there were no evidences of its being claimed by any person, Parker, witness, and Vogel built for Parker a fence on the Clay and Leavenworth sides of the lot, which, with the fences already built by adjoining proprietors, enclosed it, which evidence was corroborated by that of Eayres and Lackman, (Record, pp. 54, 56.) Witness, as agent for Parker, saw the fence standing there at different times through the year, and afterwards in 1854. That he at various times tried to sell the

lot for Parker down to 1862, when he sold it to Wardwell. The testimony of Lackman (Record, p. 56,) and of Jasper F. Smith, (p. 66,) go to show that Carlton did not build a fence on the lot in 1854; but that if he did any fencing there that year, he only repaired this fence built by Parker in 1853; and that of Hodgkins (p. 67) goes to show that the shop Carlton says he built on the lot at the same time he fenced it, and which remained there a year, was not built until *July or August*, 1855.

Plaintiff below also claimed recovery on evidence tending to show adverse possession for five years next preceding the alleged entry and ouster; and also on evidence tending to show possession merely at the date of the alleged entry and ouster.

Defendants below defended also on a title from the city, through an execution levy and sale by the sheriff to said Munford of the lot in controversy, under a judgment against the city in favor of Munford. But the court excluded the evidence of title in the city and of sale thereof on execution, and defendants below excepted.

It is alleged in the separate answers of the defendants below, (pp. 6, 7, 8,) but denied in the replications, that the title to said lot vested in the city of San Francisco by virtue of the act of Congress of March 3, 1851, and the decisions of the Board of Commissioners of the United States. Beyond this, there is no allegation in the pleadings of any title in the city of San Francisco, or of any fact from which its title can be inferred. And there was no evidence whatever received showing that the city had at any time had title to the lot, the west half of which is in controversy; nor showing whether this lot was of the pueblo, or the beach, or the water lots. The only evidence fixing its locality was, that "it was situated within the area bounded by Larkin and Johnson streets and the bay of San Francisco, and within the limits of the city as laid down on any map since 1851," (Record, p. 25;) and that it was "on the southwest corner of Clay and Leavenworth streets," (Record, p. 22;) and that it was "the west half of 50 vara lot, No. 1,188, as shown in the official map of the city," with boundaries described, (Record, p. 41.)

The court, among other matters, submitted to the jury for its finding and corresponding verdict, the following questions and instructions, with further instructions as to what constituted the several kinds of possession claimed:

1st. Whether either of the parties, plaintiff or defendant, had acquired title under the Van Ness ordinance.

2d. If either had such title, they would find for the party having it.

3d. If neither of the parties had such title, then had plaintiff below been in adverse possession for five years next preceding the alleged entry and ouster? If yes, to find for plaintiff below.

4th. If neither had title under the Van Ness ordinance, and plaintiff below had not adverse possession for five years next preceding the alleged entry and ouster, then had plaintiff below peaceable possession at the date of the alleged entry and ouster? If yes, to find for plaintiff below, (Record, 69 to 76 inclusive.)

Verdict and judgment for plaintiff below, execution for costs, and writ of restitution, (Record, p. 161,) motion for new trial, (p. 17,) denied, (p. 77,) and appeal taken to supreme court of the State, where judgment of the district court was affirmed, (p. 84.)

The errors assigned are numerous, to two of which only I ask the attention of this court.

1st. The supreme court of California erred in not reversing the judgment of the district court for error assigned in excluding from the jury evidence of title in the city, and of transfer thereof to defendants below by sale on execution against it. (Record, pp. 60–1–2.)

The evidence below was contradictory, and did not clearly show title in either of the parties under the Van Ness ordinance, nor an adverse possession in the plaintiff below for five years next before alleged entry and ouster. Hence, if the title of the city to any of the pueblo lands confirmed by the commissioners (p. 60) was leviable on execution against it, the defendant below should have been permitted to deraign title as proposed, (pp. 60–1–2.)

Were any of the pueblo lands confirmed to the city by the United States subject to forced sale on execution against it?

In Smith *vs.* Morse, 2 Cal., 524, the court held fraudulent and void an assignment by the city of San Francisco of all its real estate to trustees to sell and create a sinking fund to redeem certain bonds and pay certain debts, and held valid a subsequent levy and sale by the sheriff on execution issued

against the city on a subsequent judgment of certain upland (evidently pueblo) lots belonging to the city.

In Searle *vs.* Mitchell & Wardwell, 5 Cal., 401, the plaintiff set up title to a lot within the limits of the pueblo by purchase at sheriff's sale on execution against the city of San Francisco, and the court held the title good.

In Welch *vs.* Sullivan, 8 Cal., 196, the objection was first raised to a title to pueblo lots derived from a sale by the sheriff on execution against the city of San Francisco that the city held the title in trust for the use of its inhabitants; and it was held that, "*whether the propios of a pueblo could be sold or not at forced sale under the Mexican law, the act of Congress of* 1851 *creates a new tenure and operates a confirmation in fee to the city.* * * * And especially after the adoption of the common law in 1850 the municipal and common lands of pasturage were liable to execution sale. It is urged that the city had no title to the property sold under the judgment, and that therefore the sheriff's deed is not sufficient to authorize a recovery in ejectment. If the confirmation of the United States commissioners is to be regarded as of any value, it establishes the fact that the city had a title on the 7th of July, 1846. The decision is based entirely on that ground. But if it were otherwise, and the act ef Congress of 1851 is to be treated as a grant or release of the interest of the United States to the city of San Francisco, there was title in the city either legal or equitable at the date of the execution sale."

Such was the settled doctrine of the California courts from the admission of the State down to Hart *vs.* Burnett, 15 Cal., in which it was held that "these municipal lands, to which the city of San Francisco succeeded, were held in trust for the use of that city, and were not, either under the old government or the new, the subject of seizure and sale under execution." And on the doctrine of this case and that of Fulton *vs.* Hanlow, 20 Cal., 450, the district court excluded from the jury the evidence of title of plaintiff in error derived from the city by sale on execution against it; and the supreme court affirmed its ruling.

If there had been evidence, which there was not, that this was a pueblo lot, the ruling would still have been erroneous. The decisions of the supreme court of California, in the three cases first above cited, are founded on principles established by repeated decisions of this court and the courts of the States, while its decision in the two cases last named are, I think, anomalous, and unsustained by weight of reason or authority.

The pueblo of San Francisco was founded in 1834, (Hart

vs. Burnett, 15 Cal., 550.) I quote a statement of the character of its title under the Mexican law, from the decision of the United States commissioners, by whom it was confirmed, which is set out at large in the Record of the case, No. 287, of the City of San Francisco *vs.* The United States, in this court, the appeal in which was dismissed at this term, pp. 235–6.

"The lands for propios seemed to be under the control of the municipal authorities, for the purpose of raising funds for their support, and other municipal purposes. The regulations generally prescribe the manner in which this should be done. In the plan of Pitic, the mode proposed seems to have been by cultivation at the expense of the town, the profits being appropriated to the municipal expenses. In other cases, they were authorized to lease or dispose of them *en censo enfiteutico*, as in the California regulations of August, 1834. The egidos oe common lands stood on an entirely different footing; they werr not regarded in any sense as the property of the corporation, but were set apart and assigned for the common use of the vecinos of the pueblo. * * * * * The decree of the Spanish Cortes of the 4th of January, 1813, provided for the distribution and reduction to private property of all the lands previously occupied and used by the towns, and it prescribes minutely the manner in which this shall be done, *and treats them throughout the whole act as public or royal lands.* If these lands had been the private property of the pueblos, the Cortes would have had no more right to decree their sale and distribution than they would have had to alienate or dispose of the private property of individuals. But, it is evident from the whole tenor of the decree, that they were regarded as *public lands, and subject to be disposed of at the pleasure of the sovereign power.* * * * * ° These decrees have since been repeatedly recognized by Mexico, as part of her civil code, and that of the 4th of January, 1813, unquestionably constituted the foundation for the power, which was uniformly exercised by the Mexican authorities in California, in the distribution and granting the common and other lands of the towns, in the same manner as other portions of the public domain, except that in the former onesthe lands were granted subject to the Canon or tax which might be imposed for municipal purposes."

The United States, succeeding to the title of Mexico in these pueblo lands, granted to the city of San Francisco an American title by force and effect of the act of Congress of March 3, 1851, the 14th section of which declares that "*the fact of the existence of the said city, town, or village on the said 7th July,*

1846, *being proved, shall be* prima facie *evidence of a grant to it.*" "The act of Congress of 1851 creates a new tenure and operates a confirmation in fee to the city." (Welch *vs.* Sullivan, 8 Cal., 196.) "A confirmation by law is as fully to all intents and purposes a grant as if it contained in terms a grant *de novo.*" (Strother *vs.* Lucas, 12 Pet., 454.) "The case before us depends upon the construction of our own acts of Congress, *disembarrassed of any inquiries into the origin of these grants, or into the rights and principles on which they are founded,* or which made it the duty of the Government to acknowledge them. Inquiries of this kind were closed by the act of 1836. The title then became complete. It became an *American*, not a *Spanish* title."

Bissell *vs.* Penrose, 8 How., 331.

That the city of San Francisco thus acquired a fee unencumbered by any Mexican law or custom as to the disposition of the lands, is in effect decided by this Court in the case of Les Bois *vs.* Bramell, 4 How., 458. "In January, 1831, the city of St. Louis and other towns applied to have their rights of common further confirmed and regulated; and an act of Congress was passed declaring that the United States do hereby relinquish to the inhabitants of the several towns, &c., all the right, title, and interest in and to the town or village lots, out lots, common field lots, and commons, to be held by the inhabitants of the said towns in 'full property,' and to be regulated or disposed of for the use of the inhabitants according to the laws of the State of Missouri. *This law vested in the city corporation the town common in fee simple.*" And in the case of Woodson *vs.* Skinner, 20 Misso., 26, it is held that "the city of St. Louis has a fee-simple title in its commons."

But, if by the act of 1851, and the final decree of the commissioners in favor of the city, (appealed from by it, and the appeal pending when the sale was made by the sheriff,) the title of the city was not perfected, still, it cannot be questioned that it acquired an *inchoate* title from the United States by that act—a title which, by the laws of California, it could sell, and which could be sold on execution against it. Sec. 13 of the charter of the city authorizes the city council to sell all the real estate of the city. (Laws Cal., 1850–53, p. 948.) Sec. 217 of the practice act of California provides that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution." (Laws Cal., 1850–3.) There is no statutory provision exempting the pueblo lots from sale on execution. Sec. 66 of the amended charter, (Laws Cal., 1855, p. 266,) exempts public buildings,

wharves, plazas, and other real property dedicated to public use, but not the lots not so dedicated. The supreme court of California, in Holliday *vs.* Frisbie, (Chief Justice Field delivering the opinion,) held that the beach and water lots granted the city by the State were subject to sale on execution against the city, (15 Cal., 633.) As the act of 1851 was a grant to the city of an American title, without conditions, to be perfected on proof the existence of the pueblo, on the 7th of July, 1846, the city had upon its passage an inchoate title saleable on execution.

2. The following charge of the district court, excepted to, (Rec. p. 70,) and assigned as error, (Rec. p. 79,) is, I think, clearly erroneous: "If the jury find *that said premises are within the limits of the city, as defined by the charter of* 1851, and there is no evidence of any other grant, or that it comes within any of the exceptions and reservations mentioned in the ordinance, and if they are further satisfied from the evidence that the plaintiff, or his grantors, or either of them, was in actual possession of the premises in question, as before defined, on the first day of January, 1855, and were not themselves intruders or trespassers, from whom the possession might be recovered by parties other than the city, and that such possession was continued down to June 20, 1855, the said party so in actual possession, by virtue thereof, and of the said ordinance, and the statute of California ratifying and confirming it, acquired and became vested with the title of the city, and became the owner of the premises."

Admitting that the court could take judicial notice of the boundaries of the city of San Francisco, established by its charter in 1851, it could not take such notice that the boundaries of the grant included, or were coincident with, the entire boundaries of the city. Concede that it could take judicial notice of the existence of the pueblo, and of the fact that, under the laws of Mexico, the inhabitants were allowed the use of four square leagues of land including it, it certainly could not judicially know the boundaries of that tract, even if it had been surveyed and set apart to it. "It is not pretended," says Mr. Justice Field, in The City of San Francisco *vs.* The United States, referred to above, (see Record in that

case, p. 390,) "that such lands were ever marked off and surveyed by competent authority." In the case of Hart *vs.* Burnett, it was proved that the lot sold in execution against the city was a pueblo lot. (15 Cal., 530.) In the case of Fulton *vs.* Hanlow, (20 Cal., 480,) the decision is expressly placed on the ground that the lot in controversy was shown to be one of the pueblo lots. In this case there is no evidence whatever that this was a pueblo lot, nor that the city ever had title to it. It, therefore, does not follow that because the lot was in the city limits, it was the property of the city and subject to disposal by the Van Ness ordinance, (if not within the tracts excepted by the ordinance,) and the charge above cited is therefore wrong.

This error was material. The rights of plaintiff to recover on his alleged title under the Van Ness ordinance, on adverse possession and on prior possession, were all at issue, and the evidence was conflicting and for determination alone by the jury. There was no evidence that this was a pueblo lot, the property of the city, grantable by the Van Ness ordinance. The assumption of the court from the fact that the lot was within the city limits, and not within the exceptions named in the Van Ness ordinance, that it was, therefore, the property of the city, *grantable* by that ordinance, is an obvious *non sequitur*. It was an instruction to the jury to assume, as proved, a material fact—title in the city—not in evidence, and not of judicial cognizance.

THOMAS EWING, JR.,

2 *For Plaintiffs in Error.*

IN THE SUPREME COURT OF THE UNITED STATES.

GEORGE G. GREELY, RESPONDENT,

vs.

JAMES B. TOWNSEND, JOHN P. POWELSON, APPELLANTS.

BRIEF FOR RESPONDENT.

This is an action of ejectment, brought by respondent in the District Court of the Twelfth Judicial District, for the City and County of San Francisco, to recover of defendents possession of the west half of fifty vara lot No. 1188, in the city of San Francisco, together with rents, profits, and damages.

The defendants answered separately. The cause was tried before his Honor Judge Sawyer, and a jury. The jury rendered a general verdict in favor of plaintiff. Defendants moved for a new trial, which, after argument, was denied, and they appealed to the Supreme Court of California.

At the trial the plaintiff introduced evidence tending to show that in 1853, the lot was in the exclusive possession of one S. B. Conrey. He then gave in evidence—

1st. A deed from S. B. Conrey to F. H. Woods, dated July 25, 1854.

2d. A deed from F. H. Woods to S. B. Conrey, dated January 2, 1855.

3d. A deed from S. B. Conrey to Hesebeth Carlton, wife of Henry E. Carlton, dated February 24, 1855.

4th. A deed from Henry E. Carlton and wife to plaintiff, dated July 7, 1856.

Plaintiff also proved that at the time Conrey entered upon the lot, some time in the early part of 1853, it was vacant, open, unfenced, and unoccupied, and that the several grantees entered into possession and kept the lot well fenced with a substantial fence; built a house upon the lot in 1854; pastured the lot and cleared of wood and stumps, and used it for piling lumber and for other purposes; that plaintiff, Greely, from the date of his deed, was in the actual possession and occupancy of the premises, paying taxes and street assessments, down to the time when defendants—about the time of the commencement of this suit—entered and ousted him under the cover of darkness and night, and slipped a house upon it, and employed a number of lawless men to hold it by violence from plaintiff.

Plaintiff also proved that defendants were in possession at the commencement of this action.

The defendants, to sustain the issue on their part, attempted to show that, prior to the possession of Conrey, one James W. Parker was in possession, and then offered—

1st. A deed from Parker, by A. Williams, his attorney in fact, to James E. Munford, of St. Louis, Missouri, dated February 25, 1862.

2d. A power of attorney from Munford to defendant, James B. Townsend, dated October 5, 1859.

3d. A lease from Munford, by *attorney*, to defendant Powelson, dated March, 28, 1862.

In rebuttal, plaintiff gave evidence tending very strongly to show that Parker never was either actually or constructively in possession of the premises, and that if, by possibility, he ever was in possession, he *abandoned* that possession long before Conrey and Woods entered. Also, gave evidence tending to show *that the pretended* transfer from Parker to Munford, and the pretended lease from Munford to Powelson, *were a sham;* and that all this sham was done by Townsend, one of the defendants; and that Townsend and Powelson, at the time of the commencement of this action, were, in point of fact, in possession of the land.

The defendants offered to derain a title from *an execution sale against the city*. And also offered to show, by a decree of confirmation by the United States Land Commission, of the City's title, and that the title

was outstanding in the City; but the evidence was excluded by the Court.

Defendants made a lame and unsuccessful effort to prove possession in them from the first day of January, to the 20th day of June, 1855.

The plaintiff introduced evidence, which was overwhelming and conclusive, to show that his grantors were in open, actual, exclusive, and notorious possession and occupancy of the premises before, and on the 1st day of January, 1855, and continued the same down to and including the 20th day of June, 1855, thereby bringing himself within the provisions of the Van Ness Ordinance, and the grant therein to plaintiff. The jury found all the facts for the plaintiff, and against the defendants.

ANSWER TO POINTS AND AUTHORITIES OF APPELLANTS.

Record contains an assignment of thirty-seven errors, and I will not take up the time of this Court by bringing to its attention more than a few of these assigned errors. They are well disposed of at the hands of the full bench of the Supreme Court of California; and I here give a true copy of the decision of that Court, as reported and published in the Sacramento Union, August, 1864:

"GREELY *vs.* TOWNSEND ET AL. [No. 136.]

"This is an action of ejectment, for the possession of the western "half of fifty vara lot No. 1188, in the city of San Francisco.

"The case was tried by a jury in the Court below, who found in "favor of the plaintiff. The defendants, after moving for a new trial "without success, appealed to this Court from the judgment and order "denying a new trial.

"The record contains an assignment of *thirty-seven* errors, all of "which, in our judgment, are obviously untenable, and most of them "frivolous. When such is the case, we do not feel called upon to dis-"cuss, in detail, the points made by the appellants. The practice of "frivolously objecting to all adversary testimony and rulings of the "Court, to whatever extent it may prevail in the profession, cannot "receive, by a consideration of such objections, the sanction of this "Court. Such points in the present case as are not manifestly frivo-"lous, have been repeatedly determined by the decisions of this Court, "adversely to appellant. Their discussion would be idle and void of

"consequence, except so far as the labor thereby imposed upon the "Court is concerned.

"We have carefully examined all the evidence and the rulings and "instructions of the Court, and are satisfied that the case was fairly "presented to the jury, upon both law and fact, and that the verdict "was right.

"Judgment affirmed."

SANDERSON, C. J
CURRY, J.
SAWYER, J.
SHAFTER, J.
RHODES, J.

It would be but the *doing of a vain thing to take up the thirty-seven assignments of error*, and refute, by authority, any or all of them. By the very competent authority above quoted, all these assignments—the whole thirty-seven (in gross)—are decided and pronounced by the Court to be destitute of any claim upon the attention of the Court, by reason of their being either frivolous, or totally destitute of legal merit, and as against the well settled law of the State.

It may be proper to add, that the question put by plaintiff's counsel to defendant Townsend, when upon the stand as a witness (and objected to by him and allowed by the Court, assigned as error,) touching the purchase of the property in controversy, by said Townsend, and whether he purchased the property for himself, *were proper*, because Townsend alleges, in his answer, that *one Munford* was the purchaser and owner of the premises; that he, Townsend, acted as his agent and attorney in fact, and as such leased the premises to defendant Powelson. Townsend had previously testified in the same case, that he employed Clark to build the fence around the lot, and one Geddes to move a house on to it.

The questions were proper:

1st. To contradict the averments in the answer.

2d. To show that the agency on the part of Townsend was simulated and fraudulent in design, and wanting in good faith, and corrupt in motive; that in fact he, Townsend, was the only party in interest, and was actually in possession; although, for the purpose of concealment, he used the name of Munford, of Missouri, whom, he testified, he never saw in the State of California.

The evidence established conclusively in the minds of the jury, that this James E. Munford was merely a man of straw, if, perchance, there existed any such man in Missouri, or elsewhere.

3d. The issue was, whether Townsend, one of the defendants, made the unlawful entry, and was in possession of the premises at the time of the commencement of the action. Any evidence, therefore, tending to establish the affirmative of this issue, was relevant and competent.

It is proper to ask George Y. Loring whether he paid any taxes or assessments on the lot, because—

The witness testified that Carlton moved away from the premises in 1857 or 1858, and appointed witness, Loring, his agent to retain possession of the premises; and that he acted as such agent. As an evidence of his agency, and as said at the time of the offer by the Court below, the acts of paying assessments and taxes, were acts *which might, with other* acts, go to the jury to show possession. It was proper to be taken into consideration by the jury.

The Court below, in the trial of the action, properly excluded the decree of the U. S. Land Commissioners confirming the title of the City of San Francisco to the Pueblo lands, because—

1. The defendants only proposed to connect themselves with the title of the city by showing a judgment against the city, and an execution sale under it. This would not show title in them, as our Supreme Court of California have decided that—

1st. San Francisco was a Pueblo at the date of the conquest and cession of California, with the municipal rights of such a body.

2d. That she has, as successor to such Pueblo, right and title to the uplands within her limits, and holds those undisposed of in *trust for the uses and purposes* of the municipality.

3d. That the lands thus held in trust *are not subject to seizure and sale under execution against the city.*

Hart *vs.* Burnett, 15 Cal. 615.
Fulton *vs.* Hanlow, 20 Cal. 450.

2. The decree of confirmation does not, as claimed by appellant, give an American title to the city. It is, at least, but a *confirm-*

ation of the fact that San Francisco was a Pueblo, and that the lands within her limits *are not a portion* of the public lands of the United States.

An individual claiming by grant from the Mexican government, was obliged to present his claim to the Land Commission within a stated time: if the Commission acted favorably upon the claim, it confirmed the *grant*, and ordered that the lands be segregated from the public domain, if the grant was for quantity. If for a tract by metes and bounds, then that the survey ascertain and fix those boundaries. *But where a* town or pueblo presents its claim, the confirmation was not for a *grant*, but was rather for the ascertainment of the *alleged fact* that the town or pueblo existed on the 7th day of July, 1846. If it was determined that a pueblo existed on that day, it followed, as an inevitable conclusion, that the pueblo held the lands within its limits for the uses and purposes of the municipality.

The Court, upon the trial of the action, left to the jury the determination of the question, whether or not the demanded premises were within the charter limits of 1851 of the city of San Francisco. If they were, then, *prima facie*, they were within the limits of the pueblo to which San Francisco succeeded. This successorship was to the whole actual pueblo, and not to an intangible abstraction. And it follows that if the Court could take judicial notice of the extent and boundaries of the pueblo, because it was a political division of the province of California, and could also take notice of the boundaries of the city of San Francisco, *its successor*, because they are defined by statute: *it then* became a presumption that any lands within the latter were the property of the city.

This avoids the ordinary presumption that they were lands of the United States.

1 Greenleaf's Evidence, sec. 5 and 6.

The appellants attempted to introduce in evidence an Ordinance of the Board of Supervisors, of March 2, 1858, repealing the Van Ness Ordinance; but the testimony was excluded, and that was assigned as error.

It was properly excluded upon the ground of immateriality, because it was wholly inoperative.

The Van Ness Ordinance was, of itself, *a grant* by the city, which gave to parties in possession of the city lands, within the prescribed limits, a vested interest in those lands, *which could not* be divested by a subsequent repealing ordinance. In addition, the act of the Legislature of California, of March 11, 1858, (see Laws of Cal. 1858, p. 52,) operated as a ratification which related back to the time of the Ordinance, passed June 20, 1855.

These questions thus raised, have all been passed upon and decided.

Hart *vs.* Burnett, 15 Cal. 612.
San Francisco *vs.* Beideman, 17 Cal. 443.
Hubbard *vs.* Sullivan, 18 Cal. 508.
Board of Education *vs.* Fowler, 19 Cal. 11.
Wolf *vs.* Baldwin, 19 Cal. 306.

This case was very fully argued, and the Court affirmed the judgment below, and the appellants bring the case to this Court.

The respondent claims the ownership of the premises, and the right of possession. It does not appear in the record that any person had occupied or possessed it prior to 1853. In that year, while the ground was still vacant, unfenced, unoccupied, and unpossessed, the grantors of respondent entered upon it, enclosed it with a substantial fence, cleared the ground, built a house upon it, and used the land for pasturage and other proper purposes, up to 1856, when they conveyed to respondent Greely. And he, from that time, kept the fence in good repair, used the land for proper purposes, paid the taxes and street assessments up to April, 1862, when appellants entered and ousted him.

The jury having settled the question of fact, as to who was in possession, and having found that respondent and his grantors were in possession on the first day of January, 1855, and continued such possession up to June 20, 1855, *the main controlling question is, whether the premises was subject to seizure and forced sale, under an execution upon a judgment against the city of San Francisco.*

On the 20th day of June, 1855, the Common Council of the city of San Francisco, passed an Ordinance. That Ordinance was No. 822.

The 2d section of that Ordinance provides as follows: "The city of "San Francisco hereby relinquishes all the right and claim of the city

"to the lands within the corporate limits, to the parties in the actual "possession thereof, by themselves or tenants, on or before the first "day of January, 1855, and to their heirs and assigns forever; pro- "vided such possession has been continued up to the time of the intro- "duction of this Ordinance."

This Ordinance *entire* is copied into, and became a part of the act of the Legislature of California confirming said Ordinance, passed March 11, 1858, and found in the laws of that year, p. 52.

Certain lands are reserved and excepted from the provisions of this Ordinance; *but the lot in question* in this suit is not reserved or excepted.

In September, 1855, the Common Council of the City reordained, ratified, and confirmed Ordinance No. 822 by another Ordinance, which also appears in full in said act of March 11, 1858.

The 2d section of said act of the Legislature provides "that the "grant or relinquishment of title made by the city in favor of the "several possessors, by sections two and three of the Ordinance, shall "take effect as fully and completely, for the purpose of transferring "the city's interest, and for all other purposes whatever, as if deeds "of release and quit-claim had been duly executed and delivered to "and in favor of them, individually and by name; and that no fur- "ther conveyance or other act shall be necessary to insure the said "possession, with all the interest, title, rights, benefits, and advan- "tages which said order and Ordinance intend or purport to transfer "or convey, according to the true intent and meaning thereof."

We submit that the following propositions are maintainable and sustained by well settled law:

1. That the land in controversy is Pueblo land.

2. That it was held by the city in trust, and was not subject to seizure and sale under execution upon a judgment against the city.

3. That the city had the right, by ordinance, to convey the Pueblo lands to her individual citizens.

4. That the Legislature of California had the power and the right to ratify and confirm such conveyance.

There is a case which establishes and affirms these propositions. The opinion in the case I allude to is very full, clear, and elaborate. It takes up and discusses every proposition claimed to be law, on the part of respondent, in the case at bar, and also argues and determines every proposition assumed, and every objection raised by the appellants, Townsend et al., in the case at bar.

I refer the Court to case of—

Hart *vs.* Burnett, California Reports, vol. 15, page 530.

His Honor, Judge Baldwin, prefaced his opinion by saying:

"The immense interests involved in the decision of this case have "drawn it to a laborious and careful examination by numerous and "able counsel. Of the various points and considerations connected "with the controversy, probably no cause ever submitted to this Court "has been more thoroughly and learnedly discussed, both at the bar "and in written and printed arguments. We have postponed the "decision from time to time for further examination and argument; "for we were unwilling to pass upon the question until all sources of "correct and reliable information had been exhausted. To that end, "we have extended a latitude to the debate which we have not allowed "in any other case; and we have postponed attention to much impor-"tant and pressing business that we might fully consider this record, "unembarrassed by other engagements."

His Honor, Judge Field, then Chief Justice, undoubtedly felt the weight and magnitude of the case, as connected with the vast interests which must be controlled by its decision; and, although Judge Baldwin delivered the opinion, yet it may be fairly presumed, that Judge Field gave to the whole case, and to every portion of it, to all the history of the Spanish and Mexican legislation in regard to pueblo lands, and to each and every authority cited on the one hand and on the other hand, his undivided attention, and his most thorough research and rigid scrutiny. So that, when Judge Field concurred in the opinion, *that concurrence* had a significance worthy of his character for thorough research and comprehensive legal ability.

The argument in the opinion of the case of Hart *vs.* Burnett is so systematised that each point discussed stands out prominent and distinct, and may be examined without liability to any confusion of the points discussed.

In that opinion there are eleven propositions discussed and affirmed, which are as follows:

1st. San Francisco was, at the date of the conquest and cession of California, and long prior to that time, a Pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations.

2d. Such Pueblo had a certain right or title to the lands within its general limits; and the portions of such lands, which had not been set apart or dedicated to common use, or to special purposes, could be granted in lots by its municipal officers, to private persons in full ownership.

3d. The authority to grant such lands was vested in the Ayuntamiento, and in the Alcaldes or other officers, who, at the time, represented it or had succeeded to its "power or obligations."

4th. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority.

5th. The municipal lands, to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old Government or new, the subject of seizure and sale under execution.

6th. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty; and the Federal Government had no such control or supervision.

7th. The act of the State Legislature of March, 1858, confirming the so-called Van Ness Ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that Ordinance, and vests in the possessor therein described, as against said city and State, a title to the said lands in said Ordinance mentioned.

8th. The City of San Francisco held the municipal lands of the Pueblo, not legally disposed of, as hereinbefore explained; and her

title is wholly unaffected by Sheriff's sale under execution against her, so far as those sales touch or affect the aforesaid Pueblo lands.

9th. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat plaintiff's action.

10th. It is not clear, that the order of the Board of Supervisors of the City and County of San Francisco, repealing the Van Ness Ordinance, before the passage of the act of 1858 confirming it, destroyed the power of the Legislature to give due effect to the provisions of the Ordinance.

11th. Assuming that this repealing order was effectual to defeat the rights claimed to have vested under the Ordinance, then, the property claimed would belong to the city, and plaintiff here could not recover.

The foregoing affirmed propositions are the law of California, and have been for the last six years.

The immense interests litigated since 1860, touching the Pueblo lands of San Francisco, have been decided upon the propositions as established and affirmed in the case of Hart *vs.* Burnett.

The jury found, in the case at the bar, that George G. Greely, the respondent, was in the actual possession of the premises in controversy on the 1st day of January, and continued in the same down to the 20th of June, 1855, and that appellants were in possession at the commencement of the suit. The case finds that the premises are within the city limits, as defined by the act of the Legislature of 1851.

The authorities cited determine that the premises were Pueblo land, held by the city in trust, and that said land was not, either under the Mexican Government, or the Government of the United States, subject to seizure and sale under execution against the city of San Francisco. That the city had the right to convey the same, and did convey to private persons in actual possession from January 1 to June 20, 1855.

It is insisted, therefore, that George G. Greely, respondent in the case at bar, should be adjudged entitled to the possession and enjoyment of the premises in controversy.

The decision in Hart *vs.* Burnett (15 Cal. 530,) cited and followed

upon the following points: That the city of San Francisco succeeded to the rights of the Pueblo of Yerba Buena in the lands of the Pueblo; that these lands were held in trust for the public use of the city; that they were not, either under the old Government or the new, the subject of seizure and sale under execution; that the title of the city was unaffected by sales of the Sheriff, under execution against her; and that a defendant in ejectment, relying solely upon his possession, may set up the invalidity of such sales, or of the title derived therefrom, in defense to this action.

Fulton *vs.* Hanlow, 20 Cal., 450.

In delivering the opinion of the Court in this action, Chief Justice Field says, (20 Cal. 480. Fulton *vs.* Hanlow):

"The right of plaintiff to recover depends upon the efficacy of this "sale and conveyance. No question is made as to the validity of the "judgment of the San Francisco Gas Company, or the regularity of "the proceedings of the Sheriff, or the sufficiency of the mesne con- "veyances to pass whatever title Pixley acquired.

"The question then is: Did the city of San Francisco possess, at "the time that judgment was docketed, or the execution was levied, "any title or interest in the premises in controversy, which was the "subject of levy and sale under execution? If she possessed no "such title or interest, of course nothing passed by the sale and con- "veyance of the Sheriff; and that she possessed no such title or inter- "est, follows from the admission made by the parties on the trial of "the present action, and the decision of this Court in the case of Hart "*vs.* Burnett (15 Cal. 530.) The admission made was, that the prem- "ises described in the complaint constitute a portion of the Pueblo "lands of San Francisco, formerly known as Yerba Buena, confirmed "to the city by the decree of the United States Land Commission. "Those lands, and tenure by which they are held by the city of San "Francisco, as successor of the old Pueblo of Yerba Buena, were the "subjects of extended consideration by this Court, in Hart *vs.* Burnett. "That case, like the present, was an action of ejectment, in which the "plaintiff relied for recovery upon a sale and conveyance by the Sheriff, "under an execution issued upon a judgment against the city. The "premises in that case also constituted a portion of the Pueblo lands "of San Francisco, and the plaintiff contended that the City had suc- "ceeded to the rights of the Pueblo, with reference to them, and that

"the title was absolute, and consequently the subject of levy and sale "under execution. But the Court, after *elaborate* examination, though "agreeing with the plaintiff that the City had succeeded to the rights "of the Pueblo in the lands, was of opinion, and so adjudicated, *that* "*the lands were held in trust for the public use of the city, and were not,* "*either under the old Government or the new, the subject of seizure and* "*sale under execution.* And further, that the title of the city was "*unaffected* by sales of the Sheriff under execution against her; and "that defendant in ejectment, relying solely upon his possession, "could set up the *invalidity* of such sales and of the title derived "therefrom."

From the date of the decision in the case of Hart vs. Burnett, up to the present time, there has been a rigid and unwavering adherence to the doctrines and principles enunciated and affirmed in that case. The decisions in that case, and in the subsequent cases in the State of California touching the same subject-matter, have the respect and confidence of the Pacific coast: and we trust that the highest legal tribunal of the nation will appreciate their correctness and make the principles therein (and now the law of the State of California), the settled law of the United States.

All the points and principles in the case at bar have heretofore been so fully and ably discussed, by the ablest Judges of the California Courts, and by them so fully and clearly decided, that, in our judgment, they need not be further discussed in the present case.

And we very respectfully submit that the judgment of the District Court, as also the decision of the Supreme Court of the State, should be affirmed.

CALEB BURBANK,

Attorney for Respondent.

Wm M Stewart
for Respt